

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

* * * * *

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 13-CR-084-JDP

vs.

Madison, Wisconsin

July 6, 2018

SINOVEL WIND GROUP CO., LTD.,

9:00 a.m.

Defendant.

* * * * *

STENOGRAPHIC TRANSCRIPT OF SENTENCING HEARING HELD
BEFORE CHIEF U.S. DISTRICT JUDGE JAMES D. PETERSON

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United States District Court

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I-N-D-E-X

| <u>GOVERNMENT'S WITNESSES</u> | <u>EXAMINATION</u> | <u>PAGES</u> |
|-------------------------------|------------------------|--------------|
| DAVID HENRY | Direct by Mr. O'Shea | 15-20 |
| | Cross by Mr. Agoglia | 23-28 |
| | Redirect by Mr. O'Shea | 28-31 |
| JOHN SAMIA | Direct by Mr. O'Shea | 32-52 |
| | Cross by Mr. Agoglia | 53-61 |
| | Redirect by Mr. O'Shea | 61-61 |
| GORDON DEANE | Direct by Mr. O'Shea | 62-73 |
| | Cross by Mr. Agoglia | 75-78 |
| | Redirect by Mr. O'Shea | 78-79 |
| | Recross by Mr. Agoglia | 80-80 |
| SUMUL SHAH | Direct by Mr. O'Shea | 81-82 |
| (Telephonically) | Cross by Mr. Agoglia | 83-85 |
| | Redirect by Mr. O'Shea | 86-87 |

E-X-H-I-B-I-T-S

| <u>GOVERNMENT'S EXHIBITS</u> | <u>IDENTIFIED</u> | <u>RECEIVED</u> |
|---|-------------------|-----------------|
| Ex. S1 - Breach-Related Losses | 16 | 33 |
| Ex. S2 - AMSC Stock Exhibits | 33 | 52 |
| Ex. S3 - Scituate and Fairhaven Damages | 73 | 74 |
| Ex. S4 - Victim Impact Statement | 81 | 83 |
| Ex. S5 - Alternative Loss Calculations | 52 | - |
| Ex. 22F - AMSC-Sinovel Contracts | 61 | - |
| Ex. 28F - Warehouse Photo | 28 | - |

1 (Called to order at 9 a.m.)

2 THE CLERK: Case No. 13-CR-84, the *United States*
3 *of America v. Sinovel Wind Group Company, Ltd.*, called for
4 sentencing. May we have the appearances, please?

5 MR. O'SHEA: Good morning. Tim O'Shea for the
6 United States. With me is Brian Levine and Darren
7 Halverson also for the United States.

8 THE COURT: Good morning to all of you.

9 MR. AGOGLIA: Michael Agoglia and Alex Akerman of
10 Alston & Bird for defendant Sinovel Wind Group, Ltd.

11 THE COURT: All right. And good morning to you.

12 All right. So we're here for sentencing. I have
13 read everyone's submissions. And so normally I do a
14 rundown of the materials I've reviewed. I don't know if I
15 have a comprehensive list of everything that I have looked
16 at here. So let me just indicate that I have read the
17 presentence report. I've gotten the statements of
18 objections from both sides. I've got an addendum and a
19 revised presentence report. I have the sentencing
20 memorandum from the government.

21 And then I have the sentencing memoranda in stages
22 from the defendant I've got docketed at 493, 494 and 495.
23 I'll note that the one docketed at 495 was refiled and it
24 was submitted then as docket 496. So those are the three
25 installments there.

1 So that's what I've got here. Now let's just kind of
2 find out what I'm going to hear and who I'm going to hear
3 from this morning.

4 So, Mr. O'Shea.

5 MR. O'SHEA: You'll hear from four witnesses this
6 morning, Your Honor.

7 THE COURT: Okay.

8 MR. O'SHEA: And then all relating to the 2B1.1
9 loss determination.

10 THE COURT: Okay.

11 MR. O'SHEA: Sinovel, in their submissions,
12 suggested that the Court need not make that determination.
13 I can explain why I think the Court should make that
14 determination.

15 THE COURT: Okay. All right. So I've got four
16 witnesses that I'm going to hear from and I will ask you
17 why I'm going to make that determination. So let's find
18 out from Mr. Agoglia who he's got on tap here for his side
19 of the case.

20 MR. AGOGLIA: Your Honor, we have no witnesses
21 that we expect to call.

22 THE COURT: Okay. All right. Very good. Let me
23 just make sure that you've reviewed the presentence report
24 and you've discussed it with your client. Is that
25 correct?

1 MR. AGOGLIA: We have, Your Honor.

2 THE COURT: Okay. So all of your concerns and
3 objections with the presentence report have been addressed
4 to me then, correct?

5 MR. AGOGLIA: They have been addressed in
6 writing. And additional, as necessary, may be addressed
7 at the hearing.

8 THE COURT: Okay. All right. Very good.
9 So, Mr. O'Shea, I'll let you kind of take the lead here.
10 I have a calculation of the guidelines here that indicates
11 what the guideline -- what the guidelines should be.

12 My first question is why is that relevant? I know
13 that a component of the guideline calculation is the loss
14 amount which you're going to talk to me about. But it
15 strikes me that overall, although I'm obligated to
16 calculate the guidelines correctly in sentencing, here
17 it's quite literally irrelevant, isn't it, because the
18 guideline calculation would be used to figure out the fine
19 multiplier which is inapplicable in this case? And so I
20 really don't have -- there's also obviously no individuals
21 to incarcerate, so it's not relevant to anything like
22 that.

23 So it's a truly academic exercise because the fine is
24 capped at the statutory amount. Mr. Agoglia has conceded
25 that the amount is at least \$50 million, which would

1 justify the \$500,000 per-count fine amount, and so I don't
2 know what the guidelines do for us here.

3 MR. O'SHEA: I suggest the Court should make a
4 2B1.1 loss amount finding and take the evidence for three
5 different reasons. First, in the event that Sinovel fails
6 to follow through on its agreement to pay the victims,
7 then the Court would have a responsibility to calculate
8 the restitution. Although the law relating to 2B1.1
9 guideline loss is slightly different than the law that
10 applies to restitution --

11 THE COURT: Yes.

12 MR. O'SHEA: -- the Court would apply the
13 different sets of law to the same facts. The witnesses
14 are here now and they're willing to explain the underlying
15 facts. So it does not make sense to ask the witnesses to
16 push this back ten months and then ask them come to again
17 if Sinovel doesn't follow through with its commitment.
18 The case is already seven years old.

19 Secondly, the public has a right to know about the
20 harms caused by Sinovel and more generally caused by IP
21 theft. If the Court does not make a 2B1.1 finding, the
22 Court -- the public may be left with a misunderstanding
23 that the total harm here was the settlement of
24 \$57.5 million. Relatedly --

25 THE COURT: Didn't the public already have a

1 great insight into what happened to AMSC as a result of
2 the trial? We went through this in extreme detail.

3 MR. O'SHEA: We sure did. And although the jury,
4 I would suggest, implicitly and fulsomely rejected
5 Sinovel's continuous farce that this is a contract dispute
6 and that AMSC's products were of poor quality, frankly,
7 it's time for a judicial finding that that's not true.
8 Sinovel is a thief and they should be held accountable for
9 their criminal conduct.

10 THE COURT: Well --

11 MR. O'SHEA: Okay. So that's --

12 THE COURT: -- the jury found beyond a reasonable
13 doubt that they had stolen trade secrets, so that's --

14 MR. O'SHEA: Right, right. The sentencing
15 submissions would strongly suggest that Sinovel has failed
16 to get that message. But an independent judicial finding
17 on harm will assist those charged with developing
18 governmental policy both in the United States and in China
19 and will help businesses understand why they need to
20 invest to protect their intellectual property.

21 Also, Sinovel has chosen not to waive its appellate
22 rights and the Court will impose a sentence. And the
23 factual basis will demonstrate the basis and
24 reasonableness for the sentence should Sinovel appeal.

25 THE COURT: Okay.

1 MR. O'SHEA: So those are the reasons.

2 THE COURT: All right. Okay. So I suppose a
3 factor in the guideline calculation is this loss amount.
4 So I suppose we should hear the evidence so I can finish
5 up the calculation of the guidelines.

6 MR. O'SHEA: Okay.

7 THE COURT: Before we do that, Mr. Agoglia, do
8 you want to be heard about our activities here today?

9 MR. AGOGLIA: I do, Your Honor.

10 THE COURT: Okay.

11 MR. AGOGLIA: I think it's very clear under the
12 governing Seventh Circuit case law that you are fully
13 empowered to make the 2B1.1 finding on what is already
14 before you, that it is irrelevant and academic to go
15 further than what is clearly established. And it is a
16 matter of custom and routine that that is how it's done,
17 that these are done very commonly on the basis of the
18 minimum amount to satisfy the really necessary finding
19 here, the only necessary finding with respect to the
20 guidelines, and that is that you have sufficient authority
21 to enter a fine up to the requested maximum and there is
22 no dispute. The rest of this is irrelevant and improper
23 for what we think are the following reasons:

24 One, this shouldn't be a proxy for a restitution
25 finding. They are different standards. There are, at a

1 minimum, an enormous number of significant methodological
2 issues, causation issues, evidentiary --

3 THE COURT: Let me stop you there, because I
4 agree with you the calculation loss amount and calculation
5 of the restitution amount are two different things. But
6 the factual information is, I don't know if I'd say,
7 coextensive, but significantly overlapping.

8 So I am going to have to set a restitution amount one
9 way or the other. I'm inclined to say that we have an
10 agreement between the parties as to the restitution amount
11 and so that will do for now. But there is this potential,
12 because the restitution hasn't really been paid in full,
13 that if that agreement is breached, I'd actually have to
14 put a number on it and actually set the restitution
15 amount.

16 I agree with you completely that the analysis is
17 somewhat different, so I get that, but the data on which I
18 would base it is still substantially overlapping.

19 MR. AGOGLIA: Your Honor, we would say, in point
20 of fact, we think a lot of what's been submitted as loss
21 is not, as a matter of law, proper.

22 THE COURT: I'm going to hear about that.

23 MR. AGOGLIA: Right. I'm not sure that you will.
24 I'm not sure that there will, at end of the day, be a
25 disagreement that the parties' agreed-upon restitution

1 amount should not be respected by the government and the
2 Court. I don't think that's where we're going to be.

3 THE COURT: I don't think so either. It's the
4 contingency of having that agreement be breached that
5 we're talking about.

6 MR. AGOGLIA: And I would say whatever you do
7 today, if that were to happen, you'd have to revisit these
8 issues *ab initio* on resentencing. That would be, I
9 suspect, AMSC's position, that would be the government's
10 position, and that would be our position.

11 And so you don't cross that bridge now no matter what
12 you do today. And it's improper because what's really at
13 issue here is whether that putting out a large number in
14 loss amount, which we don't agree would be the proper
15 outcome of a detailed analysis beyond what is already
16 available to Your Honor, whether that would be
17 appropriate.

18 It frankly is a question of what punishments are
19 authorized by Congress for you to mete out here, and among
20 those punishments sully the reputation of the defendant
21 further, putting their credit worthiness at risk, putting
22 them at risk for delisting, because a loss number and the
23 nuance of loss as it relates to the sentencing guidelines
24 as opposed to a layperson's notion of loss may well not be
25 understood by some analysts in Shanghai, leading to the

1 delisting.

2 There are lots of good reasons why that's
3 inappropriate and mostly because what's really going on we
4 think is a request for an alternative form of punishment
5 which Congress hasn't authorized. That's not what you're
6 supposed to be doing in the calculation of the loss amount
7 for 2B1.1. It is really to get you to a point where you
8 are satisfied that you have the authority to do what the
9 government has asked, the max fine, and we have stipulated
10 to that. So it is, as a matter of law, we think not only
11 irrelevant, but improper to go beyond that in any
12 circumstances.

13 And I don't think again custom or tradition, which
14 has been raised before in this regard, dictates a
15 different outcome. I think this is exactly how these
16 types of cases are resolved. And those cases like can't
17 even come up in a context where the underlying loss
18 determination is itself complicated by difficult judgments
19 the Court would otherwise have to face about valuing.

20 The valuing of the trade secret here is a very
21 significant and hotly-disputed item. We have very
22 different perspectives on the proper methodology and that
23 what has been submitted as loss by the government in that
24 regard isn't within the guidelines, isn't what is
25 otherwise endorsed through --

1 THE COURT: I understand all of those
2 controversies and I'm going to hear about some of them
3 today. The question right now is whether I should get
4 into them at all. It's the kind of thing that I would be
5 called upon to do in a sentencing. I'm going to have to
6 make a decision about who's right and who's wrong about
7 the valuation on the -- the value of the trade secret, I
8 get that. I mean, these are some of the issues that have
9 been teed up for me, so I'll make a decision about them.

10 At least the real question is, your real point is, I
11 don't need to get into it at all. You're prepared to
12 stipulate that the fine of a million-five is appropriate,
13 so I don't even need the loss amount. Give them the fine;
14 we've got a stipulation on the restitution amount; call it
15 a day.

16 MR. AGOGLIA: I mean, again in terms of policy
17 and moving this forward, I would also say what is I think
18 obvious, that it also risks creating needlessly, other
19 appellate issues. Again these are very hotly-contested
20 issues in a methodological sort of basis for how you would
21 make decisions. And what is clear, everyone accepts, is
22 that you don't need to make those decisions to do what you
23 are required to do here; that is, impose an appropriate
24 penalty.

25 THE COURT: Mm-mm. All right. Very good. We

1 have the witnesses here. I'm going to listen to the
2 evidence and see how far it takes me. I share some of
3 your concerns, frankly. These are hard issues. We'll see
4 what evidence I'm given today. Maybe it will all become
5 very clear and I can make a decision about everything, top
6 to bottom here, and maybe I won't.

7 All right. So, Mr. O'Shea.

8 MR. AGOGLIA: Your Honor, one preliminary point
9 of procedure. Under Federal Criminal Rule of Criminal
10 Procedure 32(f)(2), there are -- if there are going to be
11 witnesses who are going to be making statements, we do
12 request a 26.2 production of any witness statements, as
13 were required. And if they're not produced, the rule
14 clearly provides that the Court must not consider the
15 witness's testimony.

16 THE COURT: Mr. O'Shea.

17 MR. O'SHEA: Okay. Yeah, we're well aware of our
18 obligation under 26.2. I provided some spreadsheets to
19 Mr. Agoglia that would be the work of Mr. Samia informed
20 by his consultations with Mr. Henry, so Mr. Agoglia has
21 all the *Jencks* statements he's entitled to.

22 THE COURT: Okay. Very good. All right.
23 Go ahead.

24 MR. O'SHEA: Before I start calling our
25 witnesses, I just wanted to cover Government Exhibit S --

1 S is for *sentencing* -- 5 in this case. And what we did
2 there, what the United States did, is to break down
3 alternative loss calculations.

4 Mr. Williams did a fine job summarizing the various
5 points within the presentence report. But then, as the
6 Court knows, the United States did not support all of the
7 claims. So these are the claims that the United States,
8 for our part, supports for the loss calculations and that
9 lays out the three different approaches --

10 THE COURT: Okay.

11 MR. O'SHEA: -- and does the math. I did my best
12 to avoid doing mathematics in public, so I worked it out
13 ahead of time and had my colleagues check the math.

14 THE COURT: All right.

15 MR. O'SHEA: So first we'll call Mr. Henry.

16 **DAVID HENRY, GOVERNMENT'S WITNESS, SWORN**

17 MR. AGOGLIA: Your Honor, I apologize. Another
18 point of order. If we are going to have witness
19 testimony, we would ask that other witnesses be
20 sequestered.

21 MR. O'SHEA: Okay. I guess that's why I asked
22 Mr. Agoglia if he wanted them sequestered before the
23 hearing. But if he's changed his mind, we can have
24 them --

25 MR. AGOGLIA: I didn't change my mind, Counsel.

1 I didn't say I didn't want them. I didn't know who would
2 be testifying --

3 MR. O'SHEA: All right.

4 MR. AGOGLIA: -- or making something other than a
5 victim statement.

6 MR. O'SHEA: Okay.

7 THE COURT: Okay.

8 MR. O'SHEA: The other witnesses will be
9 sequestered.

10 THE COURT: All right. I'll grant the
11 sequestration motion because it's been requested.
12 All right.

13 DIRECT EXAMINATION

14 BY MR. O'SHEA:

15 Q. Sir, could you state your name and spell your last
16 name?

17 A. David Henry. Last name H-E-N-R-Y.

18 Q. And what do you do for work?

19 A. I'm currently the chief financial officer of EOS
20 Energy Storage in Edison, New Jersey.

21 Q. And did you testify during the trial in January?

22 A. Yes, I did.

23 Q. And at that point did you go through a fulsome
24 recitation of your work history and education?

25 A. I did.

1 Q. All right. So I will skip that and sort of summarize
2 it here. But you were, at the time 2011-2012, you were
3 the chief financial officer or CFO of American
4 Superconductor, the victim in this case?

5 A. Yes.

6 Q. And you've got a BS and an MBA, you worked for Ernst
7 & Whinney and a number of other energy enterprises on the
8 East Coast; is that correct?

9 A. Yes.

10 Q. Let's talk a little bit about Government Exhibit S1.
11 And again some of these losses you talked about at the
12 trial, so we can short-circuit them, but some of them are
13 slightly different and some of them are new.

14 So let's go through, starting at the top. The
15 *Accounts Receivable*, the 1.8 -- I'm sorry, 108.7 million,
16 what is that?

17 A. Those are amounts that were due to the company for
18 shipments and intellectual property that was transferred
19 to Sinovel in the equipment or design services for wind
20 turbines. They were amounts that were delivered and were
21 unpaid as of March 31st, 2011.

22 Q. Okay. So that represents Sinovel's debt to American
23 Superconductor?

24 A. Yes.

25 Q. And when Sinovel stole AMSC's trade secrets and

1 reneged on the contracts, AMSC lost its leverage to
2 require Sinovel to pay its debt?

3 A. Yes.

4 Q. And Sinovel still has not paid any of its debt?

5 A. No.

6 MR. AGOGLIA: Objection. Lacks foundation.

7 THE COURT: How do you know whether they paid
8 their debt? When did you leave AMSC?

9 THE WITNESS: I left AMSC in June of 2017.

10 THE COURT: Okay. So at least as of that date,
11 they hadn't paid as of June 2017?

12 THE WITNESS: That's correct.

13 THE COURT: Okay. All right.

14 BY MR. O'SHEA:

15 Q. Next we've got 68.2. What is that?

16 A. In March of 2011 there was product that was waiting
17 to be delivered to Sinovel. It was actually at their
18 facilities waiting to be accepted. They refused those
19 shipments.

20 Q. "They" being Sinovel?

21 A. They, being Sinovel, refused the shipments and that
22 was the revenue value of those shipments.

23 Q. Okay. And at trial we had a slightly different
24 number and the trial number included what's called the
25 VAT; is that correct?

1 A. Yes.

2 Q. And what is VAT?

3 A. Value-added tax.

4 Q. And why is that backed out for purposes of this
5 sentencing?

6 A. Because it's not really owed to the government until
7 you deliver.

8 Q. All right. And Sinovel refused shipment?

9 A. Yes.

10 Q. All right. Next we've got the *AMSC purchase order*
11 *commitments to fulfill Sinovel contracts* of 40.3 million.
12 What is that?

13 A. At the time of March 31st, 2011, we were preparing to
14 ramp up our supply chain because we had contracts that
15 Sinovel and AMSC had agreed to for the supply of core
16 components for wind turbines and so we made noncancelable
17 commitments to many vendors to supply us material so that
18 we could deliver product to Sinovel. And that is what
19 AMSC had to pay to extricate themselves from those
20 purchase commitments.

21 Q. The next number is 296.2 million. What is that?

22 A. That number is the profit that AMSC lost with respect
23 to the contracts that were open at the time and that
24 Sinovel breached.

25 Q. And is that the amount of expected profit on those

1 remaining core component development contracts?

2 A. Yes.

3 Q. All right. The next is the 24.2 million. What is
4 that?

5 A. That amount represents the work in process and raw
6 material inventory that was on-site in AMSC-China March
7 31st, 2011, that was going to be used to build the
8 products that we would ship to Sinovel.

9 Q. Then the 300,000 legal fees, I'll ask another witness
10 about that. Could you explain how these losses directly
11 relate to Sinovel's trade secret theft?

12 A. Well, because of their theft, they no longer needed
13 to do business with AMSC. And so from their standpoint,
14 the customer relationship, they didn't need it.

15 MR. AGOGLIA: Objection. This lacks foundation,
16 commenting on Sinovel's need.

17 THE COURT: Overruled. Go ahead.

18 A. And without that customer relationship and with the
19 IP that they stole in hand, there was no need to fulfill
20 their obligations under those contracts.

21 Q. As was developed at trial, 700 employees were laid
22 off. And I want to understand -- from a financial aspect,
23 obviously loss of job, no more income, but tell me about
24 the 401-K match, how that was handled at American
25 Superconductor.

1 A. So we had a 401-K benefit plan. And the match that
2 we provided to employees was that for every dollar that
3 they put in, there was a certain percentage that would be
4 matched by the company and would be matched in the form of
5 AMSC stock.

6 Q. So we'll talk a little bit about the decline in stock
7 value. But for AMSC employees who were laid off, it was
8 really a double-hit?

9 A. That's right.

10 THE COURT: And by that you mean that they would
11 have lost their income, their salary, but also the 401-K
12 contribution?

13 THE WITNESS: They have the portion of their
14 401-K that was held in AMSC stock.

15 THE COURT: Okay.

16 MR. O'SHEA: All right. Thank you, Mr. Henry.
17 Nothing further for the United States.

18 THE COURT: Before I -- first of all, you've got
19 to stay there for cross-examination, but I'll ask you a
20 few questions here, too.

21 THE WITNESS: Okay.

22 THE COURT: So the AMSC *"work in process"*
23 *inventory and raw materials*, that 24.2, that's the amount
24 that AMSC had paid for those materials that were going to
25 be used in goods for --

1 THE WITNESS: It was the value of that inventory
2 that was paid for.

3 THE COURT: Okay. That's the question I have.

4 THE WITNESS: Yes.

5 THE COURT: When you said "the value of it," how
6 did you derive the value? That's what AMSC paid for it?

7 THE WITNESS: They paid for it and that's what
8 the purchase orders that were behind the material that we
9 bought called for.

10 THE COURT: That's AMSC's purchase price on those
11 items?

12 THE WITNESS: Yes.

13 THE COURT: Okay. And then *purchase order*
14 *commitments to fulfill Sinovel contracts*, so those are the
15 amounts that you were obligated to pay your vendors for
16 materials that you had ordered in anticipation of
17 fulfilling the Sinovel contracts?

18 THE WITNESS: That's right, and had not been
19 delivered, so there's no double-counting going on.

20 THE COURT: Okay. And there was no way to cancel
21 those; that was you're going to pay that regardless?

22 THE WITNESS: Right.

23 THE COURT: Okay. So what happened to the
24 materials that you had acquired that you were no longer
25 going to use in the Sinovel materials?

1 THE WITNESS: We tried to use as many of them as
2 we could for other customers, but a vast majority of them
3 actually ended up in our warehouse in Massachusetts.

4 THE COURT: Mm-mm. So some got used in others --

5 THE WITNESS: Some, yes.

6 THE COURT: Okay. And then *AMSC lost profit on*
7 *remaining core component and development contracts*, how
8 did you calculate the lost profit?

9 THE WITNESS: Based on the gross margin on the
10 sales, the incremental gross margin.

11 THE COURT: So this would have been the contract
12 price to Sinovel times your gross margin?

13 THE WITNESS: Yeah.

14 THE COURT: How did you calculate your gross
15 margin?

16 THE WITNESS: Gross margin was based on the cost
17 of supplying Sinovel, not only the cost of the materials,
18 but any overhead as well. It's the incremental cost of
19 that. There were people and operations that were already
20 there. Those were sunk costs, so that was the incremental
21 cost of not being able to realize the profit.

22 THE COURT: I'm a little confused by your comment
23 that it included overhead. So how is overhead included?

24 THE WITNESS: No, it doesn't include overhead.

25 THE COURT: It does not include overhead.

1 THE WITNESS: That's right.

2 THE COURT: Okay. So purely the incremental --
3 it was the gross margin on the -- go ahead.

4 THE WITNESS: What I would call the *contribution*
5 *margin*.

6 THE COURT: Okay. All right. Mr. Agoglia, your
7 cross-examination.

8 MR. AGOGLIA: Thank you, Your Honor. And, Your
9 Honor, for the record, we will incorporate directly the
10 cross-examination of Mr. Henry from the trial on these
11 issues.

12 THE COURT: If you want this to be helpful to me,
13 you're going to have to reiterate here because I was here,
14 but I don't remember.

15 MR. AGOGLIA: I do understand. I do that for the
16 record, Your Honor, and will attempt to sort of highlight
17 issues for you on cross now.

18 CROSS-EXAMINATION

19 BY MR. AGOGLIA:

20 Q. Starting with your first figure on this chart, the
21 *Accounts Receivable*, this is a figure that you initially
22 calculated in 2013, if I recall your testimony; isn't that
23 correct?

24 A. I believe so, yes.

25 Q. And have you done anything in the last year to update

1 that figure?

2 A. I believe the figure has been updated for the most
3 current exchange rates, but I can't be certain.

4 Q. Okay. And this figure includes things like the
5 value-added tax, correct?

6 A. At that time, yes, because we actually delivered
7 product to Sinoval and so they were liable for that
8 value-added tax.

9 Q. That's not an item that you expect to retain as your
10 money at the end of the day; that's a tax paid to a
11 Chinese authority, as you understood it?

12 A. Yeah. If we collect it, we have to remit it to the
13 government, yes.

14 Q. That's included in your specification of loss here,
15 isn't it?

16 A. On the *Accounts Receivable*, the 108.7 million, I
17 believe it is, yes.

18 Q. Isn't it true that in this 24.2 million-dollar "*work*
19 *in process*" *raw materials*, that also includes an
20 approximate 17% charge for value-added tax?

21 A. No, I don't believe so, because the "*work in process*"
22 *inventory* is based on just the purchase cost and the
23 purchase cost would be exclusive of VAT. You do not
24 inventory that.

25 Q. Are you sure of that?

1 A. When I was there, we did not inventory VAT.

2 Q. Are you sure that this 24.2 figure does not include a
3 17% markup for VAT?

4 A. To the best of my knowledge, it does not include it.

5 Q. Okay. Let me go back to the *Accounts Receivable* 68.2
6 million-dollar figure for an amount that's line-itemed
7 *Amount Sinovel contracted to pay for March 2011 shipments*.
8 You understand that in the contracts there was a
9 requirement that the goods that were being provided to
10 Sinovel had to meet certain requirements, correct?

11 A. Yes.

12 Q. And that included meeting the strictest global grid
13 code requirements for LVRT explicitly in the contracts
14 under which these goods were shipped?

15 A. Sure. Yeah.

16 Q. And if in fact AMSC did not perform by shipping such
17 goods, you wouldn't expect to be paid the contract amount
18 for those items?

19 THE COURT: I'm going to allow this question, but
20 that's it. I don't want to relitigate the whole question
21 about whether this was a breach of contract or the result
22 of the theft of the trade secrets. We're not going into
23 that again. Go ahead and answer that question.

24 A. Can you repeat your question, please?

25 Q. Yes. In order for these *Accounts Receivable* and the

1 108.7 million-dollar figure and 68.2 million-dollar figure
2 to be accurate, AMSC would have had to fulfilled its
3 contract obligations, including having shipped goods that
4 met the contract standards of meeting the strictest global
5 grid code requirement for LVRT; isn't that right?

6 A. In order -- sure. Yes.

7 Q. Okay. The future deliveries lost profit, that's all
8 for deliveries that you had not actually provided as yet?

9 A. It was the lost profit on the contracts that were not
10 fulfilled by Sinovel.

11 Q. And they were not contracts where you had delivered
12 product to Sinovel, correct?

13 A. No.

14 Q. Right. These were future profits that you expected
15 to make?

16 A. That's right.

17 Q. And the margin that you used for calculating this was
18 50%, wasn't it?

19 A. Yep. Sounds right.

20 Q. And do you recall being involved, as chief financial
21 officer, in the submission of regulated filings to the SEC
22 and SEC-related filings about what your gross margin had
23 been on prior sales of your components at AMSC?

24 A. Yes.

25 Q. And it's true that in prior SEC-regulated filings you

1 had disclosed gross margins substantially below 50%?

2 A. That is correct, but I will say that those are gross
3 margins for the total company and not for just Sinovel.
4 We did not disclose what our gross margin was for Sinovel;
5 we disclosed for the total company. In the total company,
6 the other businesses had losses that were associated with
7 them. The wind business generated profit.

8 Q. Sinovel represented approximately 80% of AMSC's
9 business during this time period you're talking about,
10 right?

11 A. Roughly.

12 Q. Right. So 80% of what you sold was reflected in
13 those prior gross margin filings with the SEC which were
14 substantially less than 50%; isn't that fair to say?

15 A. That is correct. But remember what I explained to
16 the judge on the gross margin: It is the incremental gross
17 margin, what I call the *contribution margin*, not the U.S.
18 GAAP gross margin, because there were costs that were
19 already embedded in the company that were going to be
20 there regardless of whether we delivered to Sinovel or
21 not. And those costs are not part of that, but they're
22 factored into the gross margin that we would report to the
23 SEC and to the public.

24 Q. What you report to the SEC, as the chief financial
25 officer, is something that you certify to be an accurate

1 statement of the gross margin as it is understood in the
2 entire industry; isn't that correct?

3 A. Yeah.

4 Q. The amount of the raw materials and inventory that
5 you had purchased in expectation of making future
6 deliveries of components to Sinovel, did you calculate
7 what value you received by selling a portion of those to
8 other customers or getting money from them in some other
9 way?

10 A. I did not calculate that, no.

11 MR. AGOGLIA: Your Honor, I think that's all we
12 have for Mr. Henry.

13 THE COURT: All right. Any redirect?

14 MR. O'SHEA: Yes, a couple.

15 REDIRECT EXAMINATION

16 BY MR. O'SHEA:

17 Q. So this was admitted at trial. These were one of
18 several exhibits that was Government Exhibit 28F. You say
19 that the materials that were to be delivered to Sinovel
20 were just boxed up and warehoused, many of them?

21 A. Yeah. And that's a representative picture of some of
22 the inventory that was in our warehouse in Massachusetts.

23 Q. Okay. Now, the judge asked, and I want to make sure
24 I understand that, the judge asked, "Well, you were able
25 to sell off some materials, some parts, repurpose them."

1 The amount recovered, is that reflected at all in any of
2 the figures on Government Exhibit S1?

3 A. I don't think it is. It's hard to -- the amount that
4 we tried to use, it was an immaterial, what I would call,
5 an *immaterial number* and one that we didn't really
6 track --

7 Q. Okay.

8 A. -- the vast majority of what was used, what was left
9 over and that we could not ship. Sinovel's product was
10 fairly unique. It was 1 1/2 megawatt wind turbines that
11 used -- and a lot of materials really specific for them
12 couldn't be used for other customers. We used what we
13 could, but it was a small portion of the overall amount.

14 Q. Okay. Well, I'm going to -- I'm asking the judge to
15 do some math here and that number probably should be
16 factored out. So if you were to take the highest possible
17 estimate of the materials that were sold and then double
18 it, what would that number be?

19 MR. AGOGLIA: Your Honor, calls for speculation.

20 THE COURT: No, it calls for an estimate. Go
21 ahead.

22 A. I would say maybe 10%.

23 Q. 10% of what? We have a lot of numbers on there.

24 A. 10% of the 24.2.

25 Q. Okay. All right.

1 A. So I would say that, you know, maybe 10% of it we
2 were able to use some in some other fashion.

3 Q. So then --

4 A. \$2.4 million, so if you do \$2.4 million and double
5 it, \$4.8 million.

6 MR. O'SHEA: Okay. All right.

7 THE COURT: It's a little bit different, but you
8 have the *purchase order commitments to fulfill Sinovel*
9 *contracts* at 40.3 million. Did you get any of the
10 materials in response to that or did you just give them
11 money?

12 THE WITNESS: Those were called *adverse purchase*
13 *commitments*. And so they were deemed adverse and recorded
14 as such because we couldn't use the material.

15 BY MR. O'SHEA:

16 Q. And does that mean you did not accept recovery; this
17 was just something sorted out with the --

18 A. There was some we actually had to take delivery and
19 ended up scrapping and others were just settlements that
20 we entered into with companies.

21 Q. So when you say you "ended up scrapping," did it cost
22 you to get rid of that material or, alternatively, did you
23 recover something?

24 A. No. When you scrap it, there's very little to be
25 recovered.

1 Q. All right. Oh, on the profit, Mr. Agoglia asked you
2 about the profit reported in public filings. And you said
3 that that, and as I understand it, is around 36% overall
4 profit. Is it fair to say that other areas of the
5 business, developing areas of the business, were supported
6 by the wind business profits?

7 A. Exactly. That's what I was trying to communicate,
8 that even though the incremental gross margin on the
9 Sinovel business was 50%, there were other elements of the
10 AMSC business that were losing money, had even in some
11 cases negative gross margins, so the Sinovel business
12 helped subsidize those other businesses.

13 MR. O'SHEA: All right.

14 THE COURT: This came from Mr. O'Shea, but I want
15 to make sure it's from you: Your gross margin reported
16 for the company as a whole was about 36%; is that correct?

17 THE WITNESS: It was in that ballpark. I'm
18 willing to assume that the number he quoted me was
19 accurate.

20 THE COURT: Okay.

21 MR. O'SHEA: Nothing further for the United
22 States. Thank you.

23 THE COURT: All right. Thank you, Mr. Henry.
24 Next witness.

25 MR. AGOGLIA: Your Honor, just for the record,

1 the SEC filings that were submitted and examined Mr. Henry
2 with at the time contained gross margins reported in the
3 20 percents and those are a matter of record. We can
4 identify those by exhibit if you'd like us to.

5 THE COURT: Thanks. I would.

6 (Witness excused at 9:43 a.m.)

7 MR. O'SHEA: Mr. Samia.

8 MR. AGOGLIA: In fact, I think those are
9 identified in our addendum, Your Honor.

10 THE COURT: Okay.

11 **JOHN SAMIA, GOVERNMENT'S WITNESS, SWORN**

12 DIRECT EXAMINATION

13 BY MR. O'SHEA:

14 Q. Would you please state your name and spell your last
15 name?

16 A. Sure. It's John Samia, S-A-M-I-A.

17 Q. What do you do for work, sir?

18 A. I'm the vice president, general counsel and corporate
19 secretary at American Superconductor Corporation.

20 Q. And how long have you worked for American
21 Superconductor?

22 A. A little over ten years.

23 Q. How long have you practiced as an attorney?

24 A. 20 years.

25 Q. Were you ever in financial analysis?

1 A. Yes. After I graduated from college in 1992, I
2 worked for General Electric in its Financial Management
3 Program, which is a rigorous combination of financial
4 positions together with MBA-level courses. That was a two
5 and-a-half year program which I graduated from with
6 distinction before going to law school.

7 Q. All right. Before -- I'm going to talk to you about
8 Government Exhibit S1 before we talk about Government
9 Exhibit S2. And I'm just going to ask you about the
10 bottom figure there, the \$300,000. What is that?

11 A. That number is a rounded-down figure which represents
12 costs that we expended on U.S. counsel, Robins Kaplan,
13 that helped us respond to the subpoenas from defendant's
14 counsel in this case.

15 Q. So that was -- those are costs related to responding
16 to defense in the criminal case, this criminal case?

17 A. That is correct.

18 MR. O'SHEA: The United States at this point, for
19 what it's worth, would move in Government Exhibit S1.

20 THE COURT: Okay. Is there any objection?

21 MR. AGOGLIA: No, Your Honor, understanding that
22 Rule 1101 applies to this proceeding.

23 THE COURT: Okay. So I'll receive S1.

24 BY MR. O'SHEA:

25 Q. So let's talk about Government Exhibit S2. That's a

1 three-page exhibit, so let's take --

2 THE COURT: Before we move on, let's just --

3 MR. O'SHEA: Yes.

4 THE COURT: -- while we're on that subject, just
5 give me a little bit more detail on how you came up with
6 the \$300,000 fee, amount of fees, for the U.S. counsel
7 responding to subpoenas.

8 THE WITNESS: Sure. We engaged this firm to help
9 us specifically once we received the first subpoena from
10 defense counsel. And the number actually was 325,000
11 based on actual invoices.

12 THE COURT: Okay. So Robins Kaplan just did the
13 work on the subpoena; they did not represent you in the
14 civil litigation?

15 THE WITNESS: No.

16 THE COURT: So this firm just did that work,
17 correct?

18 THE WITNESS: Correct.

19 THE COURT: Okay. Thank you. Go ahead,
20 Mr. O'Shea.

21 MR. O'SHEA: Thank you, Your Honor.

22 BY MR. O'SHEA:

23 Q. All right. So let's start on the first page and
24 we'll kind of take it -- I can move it around as you need
25 to explain, but the numbers are sufficiently small. We

1 should probably just focus in.

2 A. Mm-mm.

3 Q. What is the first page generally and then we'll
4 explore the numbers a little bit. What do we see on the
5 first page?

6 A. Okay. Starting with the table at top, this was the
7 market capitalization of American Superconductor as of the
8 dates in the upper left-hand corner: the 3/31 date, the
9 end of our fiscal '10; the April 6th date of 2011, the
10 date after our press release relating to the shipments
11 that were refused; April 5th, 2012, the year later; and
12 then 3/16/2018, which happened to be the date when these
13 materials were prepared.

14 If you go down the sheet, all of the information
15 that's found in this table, from price per share to number
16 of shares, that's what's here. So if you go, starting on
17 the left-hand side, the shares outstanding as of 3/31/2011
18 and 2012, those are directly from our Form 10-K that were
19 filed with the SEC.

20 And as you go further down, the *Stock Price History*,
21 from left to right, it's the March 31st, 2011 date as well
22 as the April 6th date of 2011. And on the lower
23 right-hand corner it is the year -- 2012 date that's also
24 on the table up top.

25 Just for point of clarity, the price that we had or

1 what's showing here, why it's a larger number, is because
2 in March of 2015 we had a reverse stock split. So \$24.87,
3 which was the price back in 2011, would now show up ten
4 times that amount.

5 Q. I see. Okay. So up at the top I'm going to ask you
6 to -- so this is our starting date, March 31 --

7 A. Correct.

8 Q. -- 2011. Is that the same day that Sinovel refused
9 shipments to American Superconductor?

10 A. That's the end of our fiscal year and that's when it
11 refused shipments, that's correct. But publicly, that was
12 not announced.

13 Q. And that was announced by American Superconductor on
14 April 5 --

15 A. Correct.

16 Q. -- of 2011?

17 A. We filed an 8-K where we updated our guidance on
18 financial information including the fact about Sinovel.

19 Q. And the day after your announcement April 6th, 2011,
20 we see a, and we'll see it on the second page sort of in
21 graph form, a precipitous decline?

22 A. That's right.

23 Q. Okay. And explain, in terms of market share, what
24 that means.

25 A. So in one day from that announcement, and if you

1 could scroll down a little further --

2 Q. Sure.

3 A. -- you see the price on April 5th, 2011. Go a little
4 more.

5 Q. You can use your fingers.

6 A. Oh, I'm sorry. Gotcha. So even the day before the
7 5th, we were still 24 -- I can't read that number there,
8 but around 24.87.

9 Q. Yeah.

10 A. And then after that announcement, the full trading
11 day after that announcement, we had fallen.

12 Q. Whoops. Apparently it doesn't stop. Okay.

13 A. But we had fallen where, if you take the same
14 calculation of number of shares outstanding times our
15 close price, it was a 527 million-dollar drop in market
16 capitalization.

17 Q. Okay. A 527 million-dollar drop?

18 A. Correct.

19 Q. Okay. And that is perhaps more simply reflected in
20 the table at the top?

21 A. That's right. Yes.

22 Q. Okay. That's there --

23 A. Mm-mm.

24 Q. -- 527 million. And let's look at the second page
25 where the information is shown in graph form.

1 A. Mm-mm.

2 Q. We have two graphs, both representing periods of
3 time. First period of time is end of March and beginning
4 of April 2011?

5 A. Mm-mm.

6 Q. And then on the bottom again end of March but now
7 extending past July 2014?

8 A. Mm-mm.

9 Q. Do those both fairly and accurately reflect how the
10 AMSC stock fared over those two time periods?

11 A. They do.

12 Q. All right. Now, Sinovel has repeatedly brought up
13 two different pieces of litigation as influencing your
14 stock as well. So let's talk about the first of which,
15 April 6th, 2011, there's a class action filed. Did that
16 class action directly relate to Sinovel's crime?

17 A. It did.

18 Q. How so?

19 A. Well, we had completed an offering in November of
20 2010 where we raised approximately \$150 million.

21 Q. And in connection with that offering, did you make
22 certain statements to the market?

23 A. Correct. And there was nothing about the contract to
24 this extent. Obviously we didn't know back in November
25 '10 that Sinovel refused shipments and ultimately what was

1 learned.

2 On April 6th, this is not uncommon, where there are a
3 plaintiff's bar out there, that if there's a large drop in
4 stock price that they're going to look for a class of
5 litigants that will proceed with a class action
6 proceeding. And in this case there was a large drop from
7 24.87 to 14.47 and it's not hard to get the minimum level
8 of litigants to participate in that.

9 Q. All right. Okay. And this class action was filed
10 just one day after your press release saying "Hey, Sinovel
11 has refused shipments"?

12 A. Mm-mm. Yes.

13 Q. And then this same information is expressed in a
14 longer timeline on the second -- on the bottom of the
15 second page of Government Exhibit S2. What do we see
16 there?

17 A. What I see here is a similar chart, but it's brought
18 out in 2014 when there was an insider trading action filed
19 against certain individuals.

20 Q. And you suggest that the appropriate time the Court
21 should consider is from basically April to April, 2011 to
22 2012, with a stock loss of over a billion dollars. If
23 that's the case, if we're ending in April 2012, then
24 anything that would have happened in 2014 would not have
25 influenced this stock drop ending in 2012?

1 A. Correct.

2 Q. The class action suit, essentially what it said is in
3 your -- to paraphrase, it claimed that you had failed to
4 accurately report earnings -- actual earnings in
5 anticipated revenue and essentially what you'd said in
6 your previous filing is that you had expected Sinovel
7 would pay its bills and honor its contracts; is that
8 right?

9 A. That's correct.

10 MR. AGOGLIA: Objection, Your Honor. It is
11 leading.

12 THE COURT: I'll allow a little bit of leading so
13 we can get through this. Go ahead. Overruled.

14 BY MR. O'SHEA:

15 Q. And stock declines that we see here stem from the
16 revenue loss; is that essentially it?

17 A. Yeah. It's the announcement that this -- the price
18 is from the announcement that we're not going to meet
19 guidance and we didn't know when at that point our
20 customer would take shipments and that's a reaction to
21 that release.

22 Q. And you didn't know at the time, obviously it took a
23 while for you to figure that out, but did you eventually
24 learn that the breakup occurred because Sinovel had stolen
25 your intellectual property?

1 A. We did.

2 Q. And you talk about three different ways to calculate
3 losses in the presentence report. The first one is the
4 loss in market value and you suggest that that loss in
5 market value, over a billion dollars -- reflected at the
6 bottom in yellow, the bottom of the first page -- that is
7 attributable to Sinovel because it all stems from their
8 theft of your trade secrets?

9 MR. AGOGLIA: Objection. Calls for speculation.

10 THE COURT: I don't think so. Overruled.

11 A. That's correct.

12 Q. Then in the last page to Mr. Williams you proposed
13 two other ways for the Court to consider your -- different
14 ways to think about the losses.

15 Now, Mr. Henry talked about some sort of historical
16 losses. So these would be in addition to the historical
17 losses and these are sort of more future-oriented losses.
18 And you broke those out into a lost IP value and a lost
19 gross margin approach. So let's walk through those and
20 then I'll ask you to explain to the Court how you
21 calculated those.

22 But first let's talk about the lost IP value
23 approach. You've got a number there, 296-million-plus,
24 and behind that you say, we have got in parentheses,
25 *(annual revenue selling components to Sinovel)*. How did

1 you calculate that annual revenue amount?

2 A. Sure. What I did is I took our fiscal 2009 and 2010
3 revenue and I figured out the amount that's attributable
4 to Sinovel. So they were approximately 70% of our revenue
5 during those two years. And our annual revenue was
6 approximately \$300 million, so that's about 210 million
7 per year.

8 However, what our revenue did not include was the
9 value of the refused shipments and the accounts receivable
10 that was never paid for. So it's approximately -- when
11 you add all that up, you get about \$600 million,
12 approximately. So when you look at over two years, it was
13 about 600 million attributable to Sinovel only. So
14 divided by two, that's where I came up with the 296.8
15 million-dollar number.

16 MR. O'SHEA: All right.

17 THE COURT: And you're going to have to walk
18 through that a little more slowly.

19 BY MR. O'SHEA:

20 Q. Okay. So let's go through that again.

21 A. Yep.

22 Q. So what two years are you looking at?

23 A. Fiscal '9 and fiscal 2010.

24 Q. All right.

25 A. If you were to look at American Superconductor's

1 revenues, our total revenues --

2 Q. All right.

3 A. -- we were approximately \$300 million per year.

4 Q. All right.

5 A. As our public disclosure says, Sinovel was 70% of our
6 revenue those two years, so that makes it about 210
7 million each year, so that's 420 million. What's not --

8 Q. For the two years, okay.

9 A. Correct, for the two years. What's not included in
10 that number are two things: one, accounts receivable, so
11 shipments -- but they weren't paid for. We didn't
12 recognize revenue on that.

13 Q. All right.

14 A. That's 108 million -- plus the refused shipments of
15 68 million. So when you add all of that together, you get
16 about \$600 million over two years. And then I divide it
17 by two to come up with an annual amount. That's the
18 information we had on full-year shipments to Sinovel.

19 MR. O'SHEA: Okay.

20 THE COURT: Okay. So the accounts receivable,
21 that 108 million, that is the 108 million that's on
22 Government Exhibit S1?

23 THE WITNESS: Correct.

24 THE COURT: Okay. And so that, those accounts
25 receivable, were for what years?

1 THE WITNESS: I believe it was over the previous
2 -- I couldn't exactly tell you, Your Honor, but I believe
3 it was over the previous year.

4 THE COURT: Okay. And then the refused
5 shipments, you included that. So basically if Sinovel had
6 met its obligations, paid its bills and accepted the
7 shipments, then that rounds out that 210 million and gets
8 it up to --

9 THE WITNESS: Up to 296.

10 THE COURT: -- 296?

11 THE WITNESS: Correct.

12 BY MR. O'SHEA:

13 Q. But I want to make sure that -- let me ask you a
14 couple questions, because I want to make sure we're all
15 singing off the same sheet of music. Here you're doing
16 your best to estimate what American Superconductor would
17 have earned independent from the losses that Mr. Henry
18 talked about going forward?

19 A. These are prospective. It's trying to figure out a
20 value of what we lost by no longer having this contract in
21 place. It's prospective. There's probably a very similar
22 number of 296 that Mr. Henry may have testified to, but
23 that represents existing backlog, not a prospective look
24 at what was also lost.

25 Q. Okay. And this assumes, it all assumes, that Sinovel

1 would have continued to need American Superconductor. So
2 we're not talking about the contracts that were already
3 signed; this is an attempt to look forward; is that right?

4 A. Correct. That's right.

5 Q. So once the intellectual property was taken, you had
6 no way to get it back?

7 A. That's right.

8 Q. And you -- and we're not going to get into the
9 litigation in China, but you believe that Sinovel
10 continued to use your intellectual property, at least they
11 had the ability to use it?

12 A. That's correct.

13 Q. So you're trying to look forward here?

14 A. Right, because together with the intellectual
15 property, the way the contracts were set up is that the
16 component sales were inextricably linked to the IP, so
17 that's what we're looking at going forward.

18 Q. Well, let's explore that then. You've also got the
19 total annual revenue estimated going forward times 25% and
20 you say there that's the value of the IP --

21 A. Mm-mm.

22 Q. -- and everything that you sent. How did you come up
23 with that number of the 25%?

24 A. Sure. And if I may, I'll take them in tandem.

25 Q. Sure.

1 A. So what we looked at with the value of the
2 intellectual property, it goes back to what I was just
3 saying: It's inextricably linked to the component sales.
4 So I view them as together because but for the IP, which
5 we saw they're no longer taking component sales from us.
6 So if our margin is 50%, it's fair to say that the value
7 of the IP and the margin was also likewise 50% because
8 that was the value of the IP.

9 The other way we looked at it was -- okay.

10 THE COURT: You lost me there.

11 THE WITNESS: So because the IP and because the
12 way the contracts are set up, the IP and the components
13 are linked. You take our product under the license, you
14 take our IP, you buy our products. So they're one in the
15 same. So they're related.

16 So that's why, if the margin on our sales of products
17 to them is 50%, it's because it's tied together with the
18 license. They had to buy our products. That was the way
19 it was set up.

20 THE COURT: Okay.

21 THE WITNESS: So that's the 50%. And the 25%
22 margin on the lost IP approach was, okay, we said the IP
23 has half the value of the margin, so we get a 50% margin
24 from all the sale of our goods. We just said we'll
25 ascribe half of that.

1 THE COURT: How did you decide that it was half?

2 THE WITNESS: It's ballpark. We didn't have a
3 scientific way, Your Honor, but it was --

4 THE COURT: Explain to me what nonscientific way
5 you did.

6 THE WITNESS: It was looking -- it was basically
7 looking at our margin instead of the 50% and we looked at
8 it and split it in half.

9 THE COURT: All right.

10 BY MR. O'SHEA:

11 Q. Now, there's an argument to be made that that is
12 extremely conservative to say 25% because as soon as
13 Sinovel had the source code for the PLC and the compiled
14 stolen code for the PM3000, Sinovel completely cut you
15 off.

16 A. That's right.

17 Q. So you could reasonably say --

18 THE COURT: That is way beyond leading. You're
19 just testifying.

20 MR. O'SHEA: Okay.

21 THE COURT: Ask him the question about how he
22 came up with 25%. And if you can get anything more than
23 he just split it in half --

24 MR. O'SHEA: Okay.

25 THE COURT: -- I want to hear it. But from what

1 I'm hearing right now, it's just "We had some equipment
2 and some software, two things, cut it in half, 25%."

3 MR. O'SHEA: Okay.

4 THE WITNESS: No, no, no.

5 BY MR. O'SHEA:

6 Q. Is there -- could you explain -- if there's an
7 argument for why that's conservative, explain, please.

8 A. So let me go back to the -- going back to the 50%,
9 Your Honor, that if you look at it that they know --

10 THE COURT: The 50% I basically understand.

11 THE WITNESS: Okay.

12 THE COURT: I think I have a handle on how you
13 came up with the 50% being your contribution margin. And
14 I understand too that the way you priced your product was
15 that you didn't say, "Here's our power converter bare
16 without any software and here's our software. Power
17 converter is hundred dollars, software also a hundred
18 dollars." You wrapped it all up and you said, "It's \$200
19 for the whole thing." And so your pricing didn't include
20 a separate fee for the software.

21 THE WITNESS: That's right.

22 THE COURT: So now we've got to figure out when
23 somebody bought this, how much of the \$200 were they
24 paying for the software and that's the analysis I'm trying
25 to get to. Like how would you figure out that, "Yeah, if

1 we were to sell this without the software, it would be X,
2 and with the software it's X plus Y"? So help me
3 understand how you got there.

4 THE WITNESS: Well, that's what I was trying to
5 explain, and let me try again, is that what I was trying
6 to do here is say that if we were to give them a license
7 and they were never to buy from us again, what would that
8 come up to and what would we be losing, in effect, with
9 the revenue, the future revenues, from our product. So
10 that's how, and I'll go to the 25% in a second --

11 THE COURT: Yeah.

12 THE WITNESS: -- that's how I went to the 50%,
13 because what we would be in essence doing is telling our
14 customer, "You don't have to buy from us anymore."

15 But the whole point of the relationship was, "We'll
16 license this to you, but you buy from us." But now we
17 have to figure out what we're losing as a result of just
18 handing over the IP and no longer having to buy from us,
19 so that's where the 50% came from.

20 The more conservative number was, and I'd say it's
21 50%, was just to say, "Okay. What if you split it in the
22 middle and say only half of it?" My argument would be
23 it's the full 50%. And that's the methodology there that
24 now they don't have to take product from us. That's where
25 the market is --

1 THE COURT: Does the concept of a convoyed sale
2 mean anything now? Sometimes if you have valuable
3 intellectual property, you can work out a deal with them
4 that says, "Hey, we have this patent. We'll let you use
5 it, in a sense. But in order to use it, you've got to buy
6 our equipment. The equipment itself, you know, maybe you
7 can buy that somewhere else. It's not covered by the
8 patent. But if you license our patent, then you're also
9 going to buy this product from us and we'll make some
10 profit on the product as well."

11 So that's the kind of situation that you have. You
12 have a bundle in which you have included your intellectual
13 property and some equipment at the same time. And so
14 you're making some profit on the equipment component and
15 you're making some profit on the software. Maybe the
16 software really dominates the whole thing and you just
17 give them the equipment.

18 But I need some way of parsing out how much money you
19 made on the equipment sale versus on the software sale.
20 You didn't price it separately, you didn't sell them
21 separately, but somehow we have to apportion that, so now
22 I'm trying to figure that out.

23 THE WITNESS: Yeah. I don't have the exact
24 numbers on that because I know the way it was priced -- I
25 mean, look at the license fee -- it's relatively modest

1 with the idea on the --

2 THE COURT: One way you might do this is you look
3 at the industry and you'd say, "Actually, there's a market
4 for software for power converters. And we see that if you
5 just bought power converter software off the rack, it's X
6 per unit and so that's our comparator. Our software is a
7 lot better, so it's worth more." But you have some sort
8 of comparison where you kind of parse it out and figure
9 out this is the value of the software independent from the
10 products.

11 THE WITNESS: Yeah. We didn't -- I don't have
12 that.

13 THE COURT: Okay. All right.

14 BY MR. O'SHEA:

15 Q. So what the Court described is the bundled. That's
16 reflected in the loss gross margin approach?

17 A. That's right.

18 Q. So you two have sort of talked that through, so I'm
19 not going to ask that. The 25% -- well, the Court
20 suggested perhaps there's a way to sell a PM3000
21 software -- PLCs off the shelf, but that just wasn't your
22 business?

23 A. That's not our model.

24 Q. So the 25%, is that a conservative estimate had you
25 been forced to sell your intellectual property as a

1 stand-alone item?

2 A. That's correct. There's another data point.

3 THE COURT: All right. It takes us as far as it
4 takes us.

5 MR. O'SHEA: Yep. The United States moves in
6 Government Exhibit S2.

7 THE COURT: All right. And I'll check and see if
8 there are any objections to S2.

9 MR. AGOGLIA: No, Your Honor.

10 THE COURT: Okay. It's accepted.

11 MR. O'SHEA: All right. Nothing further,
12 although I would note for the summary chart I put together
13 for the Court and defense counsel that is S5, the United
14 States only took the six-year numbers and did not include
15 the ten-year numbers, again with the eye towards being
16 conservative.

17 THE COURT: Okay. Noted.

18 MR. O'SHEA: Mr. Deane.

19 THE COURT: Okay. Hold on. There's some
20 cross-examination.

21 MR. O'SHEA: I apologize. My bad.

22 MR. AGOGLIA: Thank you, Your Honor.

23 THE COURT: Maybe you worked this out in advance.
24 I don't know.

25 MR. O'SHEA: Nope.

1 THE COURT: Mr. Agoglia, cross-examination.

2 MR. AGOGLIA: Thank you.

3 CROSS-EXAMINATION

4 BY MR. AGOGLIA:

5 Q. Good morning, Mr. Samia.

6 A. Good morning.

7 Q. The stock drop that you've discussed was, as you
8 understand it, triggered by the announcement to the market
9 on April 5th, your press release, that Sinovel had
10 rejected the shipment of component parts; is that correct?

11 A. Correct.

12 Q. And you understand from your involvement in these
13 disputes that have arisen between Sinovel and AMSC that it
14 was Sinovel's position that those goods did not meet the
15 contract requirements; you understood that was Sinovel's
16 position?

17 MR. O'SHEA: Objection, Your Honor. Relevance to
18 the sentencing hearing.

19 THE COURT: Yeah. Mr. Agoglia, I've already
20 explained my position on this. I understand your point.
21 Don't think that I'm rejecting the point entirely; it's
22 just I heard about this for hours on end.

23 MR. AGOGLIA: And it's a "beat the dead horse"
24 issue. But if it's a relevance issue, then that's
25 something we can take up separately with the Court.

1 THE COURT: Yeah. I think we're going to have to
2 discuss this, but I think I'm well familiar with the facts
3 that underlie this.

4 BY MR. AGOGLIA:

5 Q. The lawsuit that followed the next day that you've
6 spoken about, am I correct that the theory that the
7 plaintiffs' lawyers pursued in that lawsuit was that you
8 had committed securities violations or acted
9 inappropriately because you had booked the revenue for
10 those shipments contrary to generally accepted accounting
11 principles?

12 A. To clarify, but for what your client did, there
13 wouldn't have been a securities class action suit. But
14 I'm not qualified to -- on the GAAP issue, I would defer
15 to Mr. Henry on that answer.

16 But it related to, from my recollection, and I was
17 not integrally involved with it at that point, but it's
18 not uncommon with a large stock price drop to have
19 plaintiffs' lawyers come and assert their claims, which is
20 what they asserted, "You knew or should have known."
21 Correct, that's what they said.

22 Q. Are you aware or are you not aware that the basis of
23 this lawsuit was that AMSC had recognized the income on
24 these shipments which Sinovel then rejected?

25 A. It was a question of there were many things that were

1 inserted in the securities class action suit which were
2 consolidated, some of which may have been related to that.
3 I don't know exactly every claim that was in there.

4 Q. And you don't know whether that was a central claim
5 in this lawsuit?

6 A. It was ultimately settled, ultimately did relate to
7 the action that your client had done.

8 Q. Did it also relate to your GAAP compliance?

9 A. No. It related to the action that your client had
10 done.

11 Q. So didn't -- there were claims in the --

12 A. But for what your client had done, there would not
13 have been an issue. It's that simple. The April release
14 happened and on April 6th the securities class action suit
15 happened.

16 Q. I understand that. I'm just asking whether you can
17 confirm for the Court --

18 A. I --

19 Q. Just hear me out. We have to create a clean record
20 here for a question and answer.

21 A. Sure.

22 Q. I know you're trying to jump in on this. But isn't
23 it your understanding that a central claim in these
24 lawsuits was not just that the stock had dropped, but that
25 AMSC had inappropriately recognized the income from those

1 shipments already?

2 A. I don't recall.

3 Q. Let me again turn to -- if we could put up -- this is
4 page 3 of what has been marked as Government Exhibit S2.

5 I wanted to just confirm a couple of things. The
6 projection of annual revenue, this 296 million-dollar
7 figure, was taken from your review of revenue with respect
8 to Sinovel from the 2009 through 2011 time period; is that
9 my understanding?

10 A. It's through our fiscal -- what was reported in our
11 fiscal 2009 and 2010 annual reports.

12 Q. Okay. And you're aware that after that period of
13 time and for the next ten years, the Chinese wind power
14 market went through a bust cycle; isn't that fair to say?

15 A. If you say so. I didn't do an extensive analysis, so
16 I have no comment on that.

17 Q. But you've worked with AMSC for years.

18 A. I have, but this is a different matter here. This is
19 a simple -- your client did not take shipments under a
20 contract. A contract is a contract and you're sitting
21 here saying that it's a market-based issue.

22 THE COURT: Let's not argue --

23 THE WITNESS: All right. Fine.

24 THE COURT: -- between counsel.

25 A. Whether there was a market downfall or not --

1 THE COURT: When I'm talking, you have to stop.

2 THE WITNESS: Okay.

3 THE COURT: Answer his questions. If you don't
4 know, that's a perfectly acceptable answer.

5 THE WITNESS: Okay. I don't know. I'm sorry,
6 Your Honor.

7 BY MR. AGOGLIA:

8 Q. And in fact 2009 through 2010 would be the boom years
9 for the Chinese wind power market; isn't that correct?

10 A. They may have been.

11 Q. And you took the revenue that you projected from both
12 actual sales and this imputed sales from the additional
13 rejected shipments and then you ran those out for an
14 assumed ten-year future period, correct?

15 A. That's correct.

16 Q. So it assumes that that level of activity would have
17 continued at least through that ensuing ten years; fair to
18 say?

19 A. That's what it says. That's correct.

20 Q. On this question of the IP value, are you aware that
21 Sinovel paid AMSC millions of dollars to develop the IP
22 for the programmable logic controller and PM converter
23 components in a free-standing development agreement some
24 years prior to 2009?

25 A. I'm not aware.

1 Q. Are you aware that in that development agreement for
2 which Sinovel paid millions of dollars -- there's a
3 development agreement for 1.5 and for 5 megawatt machines
4 that have come into this court's evidence at trial -- that
5 AMSC agreed to provide the IP, the controlling IP, for
6 those components, quote, "free of charge"?

7 A. I understood --

8 MR. O'SHEA: Your Honor, those contracts said
9 that American Superconductor --

10 MR. AGOGLIA: Can we --

11 MR. O'SHEA: -- always retained the source code.
12 We don't need to go through that again.

13 THE COURT: I'm going to take that to be a
14 relevance objection. And as long as you keep this
15 questioning short, I'll let you go. I'll overrule the
16 relevance objection. You can get into it. We are getting
17 a little far afield here.

18 MR. AGOGLIA: Okay. Would you reread the
19 question for Mr. Samia, please?

20 (Record read.)

21 A. We never provided the rights to source code.

22 Q. The 25% IP value was for the software that would come
23 with your components if there had been this ten-year
24 period of purchases and sales, correct?

25 A. Correct.

1 Q. And that IP wouldn't have been source code, correct?

2 A. Correct.

3 Q. Okay.

4 A. But -- go ahead.

5 Q. And for that IP, it's correct, isn't it, that AMSC
6 had agreed to provide that IP, the non-source-code IP,
7 that would come with your components if a ten-year period
8 of ongoing boom-time commercial activity continued free of
9 charge under the existing agreements?

10 A. Let me clarify something on this analysis. What this
11 analysis assumed was if we no longer -- because Sinovel
12 had our source code, because they had our IP, what would
13 the cost of that be because they would no longer need our
14 components, so you're mischaracterizing this.

15 This was if we no longer had shipments to them, if
16 they had all the source code, which they didn't have a
17 legal right for, what would we charge them. That's what
18 this was looking at.

19 We never gave them the right to the source code under
20 any contracts. That's the value. Then they can
21 manipulate the parameters. We never gave them those
22 rights. So that's what this analysis was trying to do.
23 If we no longer --

24 THE COURT: That's okay.

25 THE WITNESS: Thank you.

1 THE COURT: I understand his perspective and I
2 understand your point about it, too.

3 MR. AGOGLIA: Okay.

4 BY MR. AGOGLIA:

5 Q. Did AMSC ever, to your knowledge, enter into a
6 licensing agreement for the IP that we're talking about,
7 the LVRT-specific IP, with any other customer?

8 A. Not to my knowledge. I don't recall. I don't
9 recall. I'm sorry. Could you clarify, actually clarify
10 the question?

11 THE COURT: Did you ever just license the
12 software?

13 THE WITNESS: Not that I'm aware, but I don't
14 know. I haven't done an exhaustive list of the contracts,
15 to be honest with you.

16 BY MR. AGOGLIA:

17 Q. I thought you used the phrase, when responding to the
18 judge's questions at one point, that there may have been
19 a, quote, "modest license fee" relating to this same IP.
20 Did I remember -- did I hear you correctly?

21 A. What I was just answering was the bundling that we
22 were talking about in terms of we didn't price the license
23 of 200 million for the license and 500 million for the
24 product. That's all I said. That's all I was responding
25 to.

1 Q. The *Lost gross margin approach* here again assumes a
2 ten-year going forward commercial enterprise at the robust
3 levels of the 2009 to 2010 time period; is that fair to
4 say, if I understand what you've done here?

5 A. That's correct.

6 MR. AGOGLIA: Your Honor, we have no further
7 questions for Mr. Samia.

8 THE COURT: Any redirect?

9 REDIRECT EXAMINATION

10 BY MR. O'SHEA:

11 Q. I'm going to turn your attention to -- I'm sorry.
12 Yeah, if we can get that. When we met in Devens,
13 Massachusetts, you provided me a series of contracts; is
14 that correct?

15 A. Correct.

16 Q. And one of those is now marked as one page of
17 Government Exhibit 22F, page 8. And like all the other
18 development contracts, it clearly indicates that the
19 rights to the source code remains with Windtec and that
20 was a subsidiary of American Superconductor, right?

21 A. That's correct.

22 MR. O'SHEA: Nothing further.

23 THE COURT: All right. Very good. Thank you,
24 Mr. Samia.

25 THE WITNESS: Thank you.

1 (Witness excused at 10:23 a.m.)

2 MR. O'SHEA: Mr. Deane, please.

3 MR. AGOGLIA: The witness has asked and we have
4 agreed that they may stay.

5 THE COURT: After their testimony?

6 MR. AGOGLIA: Yes.

7 THE COURT: Okay.

8 **GORDON DEANE, GOVERNMENT'S WITNESS, SWORN**

9 DIRECT EXAMINATION

10 BY MR. O'SHEA:

11 Q. Mr. Deane, could you state your name and spell your
12 last name?

13 A. Gordon Lewis Deane, D-E-A-N-E.

14 Q. What do you do for work?

15 A. I work for Palmer Management and Palmer Capital
16 Corporation.

17 Q. And through a series of entities, have you invested
18 in wind turbines in Scituate and Fairhaven, Massachusetts?

19 A. Yes.

20 Q. Did you submit, and you can see this to your left, a
21 statement that was provided to the probation office
22 summarizing losses you feel were triggered by your
23 dealings with Sinovel?

24 A. Yes, I did.

25 Q. And we're going to go through those statements. And

1 as you know, the government supports some of your claims
2 and the government does not support other of your claims;
3 do you understand that?

4 A. I do.

5 Q. You, with your business associate, Sumul Shah, bought
6 wind turbines in Scituate, Massachusetts, Fairhaven, and
7 then you were also somewhat involved in a wind turbine
8 erected in Charlestown, Massachusetts; is that correct?

9 A. Yes. I was peripherally involved.

10 Q. Say that again?

11 A. I was peripherally involved. I provided a bridge
12 loan to get the turbines from China to the U.S. because
13 the MWRA would not pay for the charges to deliver in the
14 country.

15 Q. And MWRA stands for Massachusetts --

16 A. Massachusetts Water Resources Authority.

17 Q. And they were the purchaser of the Charlestown
18 turbine?

19 A. Yes.

20 Q. Before any of the turbines were commissioned, did
21 Sinovel provide a statement to you and to Mr. Shah
22 claiming that the American Superconductor's intellectual
23 property claims were unfounded and that Sinovel had
24 developed the LVRT solution itself?

25 A. I don't recall them saying they developed the

1 solution themselves. But they did say that the claims
2 against them were unfounded, yes.

3 Q. Had you known that the turbines contained stolen
4 software, would you have purchased the turbines?

5 MR. AGOGLIA: Objection. Relevance.

6 THE COURT: Overruled.

7 A. No. Our contract specifically called for AMSC
8 equipment.

9 Q. Why so?

10 A. Because that's what Sinovel represented it was
11 selling to us and we were -- our exhibits specifically
12 refer to AMSC software and AMSC equipment.

13 Q. But that reference was not -- I want to make sure
14 we're speaking clearly to each other and make sure you
15 understand. Had you known that the turbines -- had you
16 known that they contained stolen software, would you have
17 purchased the turbines from Sinovel?

18 A. No.

19 Q. Let's explore -- and this is a longer statement
20 that's summarized within the presentence report. I'm
21 going to -- and I've taken the liberty of highlighting
22 certain parts, but I'm going to go to page 6 and ask you
23 to just explain how the losses relate to Sinovel's crimes.
24 And I'll ask you the same question as it relates to both
25 Scituate Wind and Fairhaven Wind. The first thing is the

1 *Past Due Availability Liquidated Damages.* How do those
2 claims relate to Sinovel's crimes?

3 A. Well, if I could back up a little bit.

4 Q. Sure.

5 A. We had entered into both a Turbine Supply Agreement
6 for each of the project companies. Scituate Wind and
7 Fairhaven Wind entered into a Turbine Supply Agreement
8 with Sinovel. We also entered into a Maintenance Service
9 Agreement which required them to operate and maintain the
10 equipment for five years.

11 The Turbine Supply Agreements had an availability
12 guarantee in them. And when --

13 Q. And when you say "availability guarantee," what does
14 availability mean?

15 A. Availability means the equipment is available to
16 operate basically when the wind is blowing. An
17 availability guarantee has a lower availability guarantee
18 for the first three months, a higher availability for the
19 next three months, and then a 95% availability requirement
20 thereafter.

21 Q. All right. And that was what Sinovel guaranteed in
22 the purchase agreement for these turbines?

23 A. Correct.

24 Q. So when the wind is blowing, the turbine was going to
25 create electricity, after a period of time, 95% of the

1 time?

2 A. Yes.

3 Q. Okay. And then was the availability -- did they meet
4 their standards while the maintenance crew was there?

5 A. While Sinovel was there and operating the equipment,
6 they were very close, in the 93, 94 percent -- I think I
7 have it in here in the text -- 93- or 94-percent
8 availability. And again this is, you know, early in the
9 operations of the equipment.

10 Q. All right. And then at some point Sinovel was
11 charged with crimes. They pulled, simultaneously, they
12 pulled all their maintenance folks out of Massachusetts;
13 is that your understanding?

14 MR. AGOGLIA: Objection. Leading.

15 THE COURT: It's a little bit leading, but I
16 don't think it's substantially in dispute. Overruled.
17 Go ahead.

18 A. Yes. When the Department of Justice filed a lawsuit
19 against them, they very promptly pulled their people out
20 of the Boston area, leaving us with no one to operate the
21 equipment initially.

22 Q. And did that influence the availability?

23 A. Yes.

24 Q. How so?

25 A. Well, on a numerical basis, the availability went

1 from, you know, in the low 90s to in the 70s, 70%
2 available. Sinovel did contract with another operator,
3 but the operator obviously wasn't familiar with the
4 equipment and also wasn't getting support from Sinovel in
5 China to try to maintain the equipment. So the
6 availability went way down, which affects the revenue
7 stream for the projects.

8 Q. And for Scituate, the lower availability, that would
9 be the figure of 468,000, for Scituate?

10 A. Excuse me. The lower availability, the 468?

11 Q. Yeah.

12 A. Yes. As I said, the Turbine Supply Agreement has a
13 specific provision for availability and it has an exhibit,
14 Exhibit H of the Turbine Supply Agreement, which
15 calculates what the damages will be based upon the
16 availability. And these numbers in this report is
17 straight from Exhibit H applying the formulas in
18 Exhibit H.

19 Q. Okay. The formulas that you and Sinovel had agreed
20 to?

21 A. Yes.

22 Q. Okay. I see Fairhaven is not quite twice as much,
23 816,000 for the availability damages. Is it twice as much
24 because there are two turbines there at Fairhaven?

25 A. That's pretty much it, yes.

1 Q. Okay. Tell me about the *Past Due Increased O&M*
2 *Costs*. First of all, what is O&M?

3 A. O&M is operation and maintenance. As I mentioned, we
4 entered into five-year maintenance service agreements with
5 Sinovel. They pulled their people out. They stopped
6 maintaining the turbines. While they contracted with
7 Gemini Energy Services, they were not providing support to
8 Gemini Energy Services and Gemini didn't really know how
9 to operate these particular turbines.

10 And then Sinovel stopped paying Gemini, so obviously
11 Gemini stopped working. We had to hire Gemini Energy
12 Services. And we subsequently replaced them with another
13 operator, Baldwin, which is -- so we incurred these
14 additional costs above and beyond the contracted-for costs
15 that would have been paid to Sinovel under the terms of
16 the Maintenance Service Agreement.

17 Q. Okay. All right. And that is 225,000 for Scituate
18 and 478,000 for Fairhaven; is that right?

19 A. Yes.

20 Q. Okay. And the next is we've got *Cost of Parts &*
21 *Supplies*. What is that?

22 A. The Maintenance Service Agreement requires that at
23 the end of the five-year period, any parts that had been
24 used, Sinovel would restock so that we would have the same
25 inventory of spare parts at the end of the five-year

1 period as we started with.

2 Now, what we did, to be fair, is when we incurred
3 extra O&M costs for parts, we did not double count it in
4 the spare parts that were then missing.

5 Q. And the other parts here that are not highlighted,
6 you may disagree, but the government took the view that
7 those were not countable for purposes of the guidelines,
8 so that's just our view. But at the same time, you've got
9 *Damage Offsets Taken* here. And what are the damage
10 offsets?

11 A. The terms of the Turbine Supply Agreement require
12 that Sinovel put up a letter of credit equal to 10% of the
13 value of the equipment to support their obligations. They
14 originally put one up for the Scituate Wind turbine. They
15 could not get one for the Fairhaven Wind turbine. The
16 Scituate one, they could not renew them, so it got old.
17 We had that cash. Under the terms of the supply
18 agreement, we had an interest in that short presentation.
19 We gave them credit for the fact we were holding those
20 funds.

21 Q. Okay. However, clearly the United States suggests
22 that the Court should not allow certain costs and it
23 follows that those offsets are applied here and they're
24 not subtracted off again because those offset credits, the
25 United States would suggest, should be applied to the

1 disallowed losses, not the allowed losses.

2 We'll get to the numbers at the bottom. Tell us
3 about the *Projected Future Damages* and how those are
4 calculated. First, let's start with the *Lost Revenue due*
5 *to Lower Availability*.

6 A. Well, based upon how things have operated since
7 Sinovel left, how we got to our availability liquidated
8 damages for the damages to date, we projected that that
9 availability would continue, that lower availability would
10 continue, into the future. And we did the same thing with
11 increased O&M costs which had been substantially higher:
12 We projected those higher O&M costs into the future.

13 Q. And how far into the future did you project those?

14 A. In terms of the service agreement for five years, a
15 reasonable life of wind turbines would be 20 years,
16 probably 25 or 30, but we protected just for 15 years
17 going forward.

18 Q. 15 years?

19 A. Yes.

20 THE COURT: But the contract for maintenance that
21 you had was only for five years.

22 THE WITNESS: Yes. Correct.

23 BY MR. O'SHEA:

24 Q. But do you take the view that the lower availability
25 stems in part from the fact that -- in the future it stems

1 from the fact that Sinovel abandoned the maintenance
2 contracts? And, if so, please explain why that's your
3 belief.

4 A. As I said, when Sinovel was -- had their people there
5 and they were actually operating the equipment, we had
6 availabilities in the 90s. When they pulled out, the
7 availability dropped into the 70s. That's just the way --
8 just what happened. And it's been hard to get the
9 availability back up because of the lack of support from
10 Sinovel.

11 Over the years we have had many discussions with
12 them. We've talked about settling. We were not able to.
13 So these are the damages that's calculated in the
14 contracts.

15 Q. Because Sinovel abandoned suddenly, did you have any
16 opportunity to have them support or train a new
17 maintenance team?

18 A. No.

19 Q. And has Sinovel been of assistance to help with
20 replacement parts, and so on, for their idiosyncratic
21 turbines?

22 A. No.

23 Q. As a result, have you and your colleagues had to sort
24 of jimmy around with the different parts, different
25 software, trying to keep these turbines working?

1 A. Yes, we have.

2 Q. And do you believe the lower availability is
3 essentially a residue of Sinovel's abandonment of your
4 turbines?

5 A. Yes, I do.

6 Q. You also have *Increased O&M Costs to be Incurred*.
7 Could you explain why you believe those would go forward
8 into the future as well?

9 A. Again when Sinovel was operating, they had people
10 here who were trained on those wind turbines. They knew
11 them inside and out and they knew how to keep them running
12 and they knew how to keep them operating at a reasonable
13 cost. That has been a challenge for us. I think in the
14 write-up we talk about how O&M costs have been two to four
15 times as much as we'd contracted for.

16 If Sinovel had not abandoned the project, pulled its
17 people out, we expect that we would have continued to keep
18 them operating and maintaining the equipment and giving us
19 both higher availability and lower O&M costs. And from
20 our perspective, from owners-of-wind-turbine's
21 perspective, it's a double whammy: We have less production
22 and we have a lot of operating costs. We have to make a
23 dime on financing these projects.

24 Q. So the number at the bottom there, the 12,411,541, is
25 that the cumulative amount of those -- all the numbers

1 that the United States suggests should be included as your
2 losses?

3 A. Those are the direct costs for Scituate Wind and
4 Fairhaven Wind and ignoring our legal costs, the other
5 costs we put in or, you know, other parties that had
6 damages as a result of this action and we've been told
7 that we can't really submit those. So for the damages,
8 aside from legal costs that Scituate Wind and Fairhaven
9 Wind occurred, yes, that's a reasonable number.

10 MR. O'SHEA: The United States moves in
11 Government Exhibit S3.

12 THE COURT: Any objection?

13 MR. AGOGLIA: Your Honor, just for the record,
14 we've never seen this before and it's not for want of
15 asking for this type of material. And just from a quick
16 check, I'm not sure it all tracks through to the same
17 numbers in the presentence report, so we --

18 THE COURT: Maybe I'll just ask Mr. O'Shea to
19 explain to me how this document was used. I gather
20 Mr. Williams had this when he did the presentence report?

21 MR. O'SHEA: Yes, I believe this was provided to
22 Mr. Williams. I understand that Mr. Williams summarized
23 this and included this information in the presentence
24 report.

25 THE COURT: And was it given to Mr. Agoglia and

1 his team at the same time?

2 MR. O'SHEA: Only through the presentence report.
3 I understood that this information was communicated
4 through the presentence report.

5 THE COURT: Okay. So Mr. Williams had it and
6 Mr. Agoglia didn't have it?

7 MR. O'SHEA: That's only through the presentence
8 report. That's all I understood, that that information
9 was communicated.

10 MR. AGOGLIA: And to be clear, and the government
11 had it.

12 THE COURT: Well, yeah. I'm going to receive it.
13 I have my misgivings about it and I don't know why
14 Mr. Agoglia didn't get a copy of it.

15 MR. O'SHEA: I believe, as I say, I believe it
16 was communicated through the presentence report.

17 THE COURT: Well, I get it, it's paraphrased in
18 that.

19 MR. O'SHEA: Yeah.

20 THE COURT: But usually the criminal discovery
21 that the probation office works from is provided to the
22 defense.

23 MR. O'SHEA: Right. Yeah. This was something
24 created for the presentence report writer.

25 THE COURT: Mm-mm. All right. Okay. Go ahead.

1 So you're finished, Mr. O'Shea?

2 MR. O'SHEA: Yeah.

3 THE COURT: Okay. Cross-examination.

4 MR. AGOGLIA: Thank you, Your Honor.

5 CROSS-EXAMINATION

6 BY MR. AGOGLIA:

7 Q. Mr. Deane, the five-year contract with Sinovel for
8 maintenance began sometime in 2011; is that correct?

9 A. It began in 2012. I think it was probably April for
10 Scituate and May for Fairhaven.

11 Q. And did I understand you correctly to say that this
12 third-party vendor, Gemini, who did some of the work at
13 the turbines on-site, was the vendor that had originally
14 been working on the turbines through the Sinovel
15 maintenance contract?

16 A. Well, no. Actually, Sinovel had its own people
17 stationed in the Boston area and they were operating and
18 maintaining the wind turbines, then they pulled their
19 people out and contracted with Gemini Energy Services to
20 provide O&M services.

21 Q. Sinovel contracted --

22 A. Gemini was a subcontractor to Sinovel.

23 Q. -- Sinovel contracted to have that company provide
24 those services in their absence; do I understand that
25 correctly?

1 A. Yes.

2 Q. And you made the choice to replace them at some point
3 because you didn't think their work was as good as it
4 should be; is that fair to say?

5 A. Well, when Sinovel stopped paying Gemini, Gemini
6 stopped working. So since Gemini had some experience with
7 the wind turbines, we hired them to be an operator, and
8 then we subsequently replaced them with a different
9 operator.

10 Q. When, sir, if you know, did Sinovel stop paying
11 Gemini for the purpose of maintaining your turbines in
12 Massachusetts?

13 A. I'm not familiar with all the back-and-forth between
14 Gemini and Sinovel. My belief is they stopped being paid
15 sometime in early 2014. And they were then realizing they
16 weren't going to get paid in, say, October, November that
17 year and that's when they quit operating.

18 Q. Did Sinovel have disputes with your organization, the
19 owners of the wind turbines, about the failure to make
20 payments it believed were due under your contracts with
21 Sinovel?

22 A. Could you rephrase that? I'm sorry.

23 Q. Yes. Happy to. Was it the case, Mr. Deane, that
24 Sinovel, as you understood it, believed that you were not
25 making payments that were actually due under the contracts

1 relating to the maintenance of your wind turbines?

2 A. We were withholding payment from Sinovel, in
3 accordance with the Turbine Supply Agreement, to enforce
4 their guarantees. And we had -- we sent them several
5 default notices saying that "This is the amount that we
6 owe you. This is the amount you owe us. Can we settle
7 that?" And it never got settled.

8 Q. Is it the case that all of these disputes -- the
9 disputes about what Sinovel believed you owed, what you
10 believed Sinovel owed you -- your claims for damages have
11 now been finally resolved?

12 A. These amounts have not been resolved. We have
13 entered into a settlement agreement. I believe it's been
14 provided to the Department of Justice and to the Court.
15 We have entered into a settlement agreement with Sinovel
16 as a result of this matter, yes.

17 Q. Okay. And you have asked for your statement to be
18 provided to the Department of Justice in this matter about
19 those agreements to be submitted to the Court; is that
20 correct?

21 A. Yes, in accordance with the terms of the settlement
22 agreement.

23 Q. And is it correct that those agreements provide that
24 upon receipt of the agreed-upon settlement payment from
25 Sinovel to you and the other Massachusetts wind turbine

1 operators who have made victim statements here that that
2 payment would be for, quote, "all economic loss directly
3 or indirectly related to any dispute between the parties,
4 including all claims for restitution or harm to the
5 customers arising directly or indirectly from Sinovel's
6 conduct which is the subject of the *United States v.*
7 *Sinovel* criminal action"?

8 A. If you're reading from the notice I provided or from
9 the settlement agreement itself, yes.

10 Q. I'm representing, sir -- this is not meant to be a
11 memory test. I represent that that is, I submit, a
12 faithful reading of your statement and that faithfully
13 captures what you understood you to have resolved.

14 A. Yes.

15 MR. AGOGLIA: I have no further questions, Your
16 Honor.

17 THE COURT: Redirect.

18 REDIRECT EXAMINATION

19 BY MR. O'SHEA:

20 Q. You didn't provide me the actual settlement itself,
21 but rather your statement, as you're required to do under
22 that settlement; is that correct?

23 A. That's correct.

24 Q. And you understand that I provided that statement to
25 Mr. Williams, as an arm of the Court?

1 A. I assume so, yes.

2 Q. Okay. And then you are to receive, under that
3 agreement, \$850,000, is that right, that you'll divide
4 among all the Massachusetts turbine owners affected?

5 A. Yes. The funds that will be coming out in Chinese
6 currency and converted, and fees for conversion and
7 everything else, but it's approximately that amount, yes.

8 Q. And you are optimistic that that financial
9 transaction is in the works now?

10 A. I received a notice, written mostly in Chinese, this
11 morning which had 850,000 in it. And it had a similar
12 amount, or it had an equivalent amount I guess, in R and D
13 in it. It had an account in Hong Kong listed.

14 It did not have our account in Cambridge Savings Bank
15 listed, that I could tell. And I've been in
16 correspondence with Cambridge Savings Bank several times
17 this morning. As of before I just now walked in here,
18 those funds have not yet been received at the account in
19 Cambridge Savings Bank.

20 MR. O'SHEA: All right. Nothing further.

21 THE COURT: Very good. Thank you.

22 MR. AGOGLIA: Just one clarification about the
23 payment, Your Honor.

24

25

RECROSS-EXAMINATION

BY MR. AGOGLIA:

Q. Mr. Deane, you understand that the agreed-upon amounts for restitution and other harm you may have suffered as a result of Sinovel's conduct has been transferred to a Bank of America account in its Hong Kong location?

A. From the account number, yes. Again I can't read the Chinese. But I think from the account number, yes, it's a Bank of America account.

Q. The Bank of America account number indicates a B of A account number, correct?

A. I assume so again from the account number.

Q. Do you have any reason -- you understood that there would need to be sort of an intermediary financial institution to transfer the funds from China to your specified account in Massachusetts?

A. Yes.

Q. So do you have any reason to doubt that the funds --

THE COURT: I think I get it: The check is in the mail. All right. Thank you. Next witness.

(Witness excused at 10:50 a.m.)

MR. O'SHEA: Next is Mr. Shah. And Mr. Wiseman was going to give him a call.

(Discussion held off the record.)

1 MR. O'SHEA: Mr. Shah, this is Tim O'Shea.
2 You're here in court. I will ask the court reporter to
3 administer the oath.

4 **SUMUL SHAH, GOVERNMENT'S WITNESS, SWORN**

5 DIRECT EXAMINATION

6 BY MR. O'SHEA:

7 Q. Mr. Shah, state your name and spell your last name.

8 A. My name is Sumul Shah. Last name is Shah, S-H-A-H.

9 Q. And, Mr. Shah, you testified at the trial in January;
10 is that correct?

11 A. That's correct.

12 Q. I'll skip over your background. You were involved in
13 the purchase of the Charlestown turbine; is that correct?

14 A. That's correct.

15 Q. And I sent you the other day, Government Exhibit S4.
16 Have you had an opportunity to look at that?

17 A. I have.

18 Q. And we're just going to talk about one figure on the
19 last page and that is a *Charlestown Wind Maintenance Issue*
20 for \$77,879.76. Can you explain -- we've already had some
21 maintenance testimony on this point, so we're not going to
22 develop it a great deal. But could you explain why you
23 think the *Wind Maintenance Issue* is related to the crimes
24 in this case?

25 A. We had -- so the Charlestown Wind turbines, we were

1 under contract with Sinovel to provide maintenance of the
2 turbines for a two-year period. That two-year period
3 ended in October of 2013 as a result of the issues
4 involved in this case. Sinovel withdrew from the United
5 States and stopped servicing the turbines in Charlestown.

6 Because we still had a contract with our customers to
7 fulfill maintenance obligations through October of 2013,
8 we used a combination of our own people, plus hired an
9 outside vendor, Gemini Energy Services, to fulfill the
10 obligations that Sinovel had under their maintenance
11 agreement.

12 MR. O'SHEA: All right. Okay. That is it. I
13 will notice that -- I would move in Government Exhibit S4
14 and observe that that statement is fulsomely summarized,
15 almost word for word, in a presentence report, the
16 original presentence report and in the revised presentence
17 report, although the revision has some commentary in there
18 beginning at paragraph 49.

19 THE COURT: Very good. All right. Mr. Agoglia,
20 do you want to be heard on S4; any objections on S4?

21 MR. AGOGLIA: We have the same objection, Your
22 Honor. We were never provided with a copy of this
23 statement and so do object to its use in this proceeding.
24 I think I may have one or two questions for Mr. Shah about
25 this figure.

1 THE COURT: I'll give you a chance. I'll receive
2 the -- your objection is noted. It concerns me a little
3 bit, but I'll receive it for purposes of my work here and
4 then you can do your cross-examination.

5 CROSS-EXAMINATION

6 BY MR. AGOGLIA:

7 Q. Mr. Shah, this is Michael Agoglia on behalf of
8 Sinovel. This \$77,879.76 line item is in fact payments
9 that you made to Gemini, the vendor who you used after the
10 expiration of the Sinovel contract in October of 2013;
11 isn't that correct?

12 A. No. This is payments that we made to Gemini to get
13 us through October of 2013.

14 Q. Okay. So it was just for the month of October 2013?

15 A. No. It was from the time that Sinovel withdrew their
16 forces from the United States through October 2013. I
17 believe they withdrew in June of that year, so it was for
18 the time period from June through October.

19 Q. Isn't it the case that Sinovel had arranged for
20 Gemini to do the maintenance in its absence?

21 A. This is the amount that Lumus paid Gemini. I don't
22 believe that Gemini was paid by Sinovel for their
23 services, so Gemini then sought payment directly from us,
24 which we paid.

25 Q. My question is a little bit different, Mr. Shah.

1 Isn't it true that Sinovel arranged for this vendor to
2 come in and do the maintenance services in its absence?

3 A. I believe that's correct.

4 Q. Okay. And you would have had to pay Sinovel
5 compensation for providing the same services; isn't that
6 correct?

7 A. The compensation to Sinovel was part of -- was part
8 of the Maintenance Supply Agreement -- Maintenance
9 Services Agreement, that was signed after the Turbine
10 Supply Agreement. So it was, in total, part of the
11 overall contract with Sinovel.

12 Q. I'm sorry. I'm not sure I'm understanding. Let me
13 try to break it down. Did you have to compensate Sinovel
14 for any maintenance work that was done during the time
15 period that you say Gemini stepped in in Sinovel's
16 absence?

17 A. Yes. Sinovel would have been paid for their
18 maintenance services as part of the overall agreement that
19 we had.

20 Q. I'm sorry. That was a payment that you had made all
21 up front?

22 A. No. It was a payment that we had made in various
23 installments.

24 Q. And so we're clear on the record, is it your
25 testimony that you paid Sinovel compensation for work that

1 it had not done with respect to the maintenance of the
2 Charlestown turbine after it withdrew from the United
3 States?

4 A. We paid Sinovel for work that it has not done.

5 Q. Okay. And how much did you pay Sinovel for any
6 maintenance that was to have occurred or that did occur
7 during this period which you roughly placed between June
8 of 2013 and October of 2013?

9 A. I don't have the numbers in front of me.

10 Q. Did the amount you paid Gemini reflect a market rate
11 for their services in maintaining the Charlestown turbine?

12 A. The amounts that we paid Gemini were based on time
13 and materials. So they had to document the time that they
14 spent performing the maintenance services as well as any
15 material costs and that amount was calculated by Gemini.

16 Q. Right. And is it fair to say that's a fairly
17 standard way of compensating people for their maintenance
18 work?

19 A. No. Typically we sign a lump-sum contract to cover
20 all the maintenance work.

21 Q. Was the 77,879-dollar compensation fair for the work
22 that Gemini had done?

23 A. Yes. It represented fair value for the work they had
24 performed.

25 MR. AGOGLIA: Okay. I have no further questions,

1 Your Honor.

2 THE COURT: Okay. Any redirect?

3 MR. O'SHEA: Yes.

4 REDIRECT EXAMINATION

5 BY MR. O'SHEA:

6 Q. Just to be clear, did Sinovel abandon the Charlestown
7 maintenance agreement without providing a new vendor?

8 MR. AGOGLIA: Objection. Asked and answered.

9 THE COURT: No. Go ahead. Overruled.

10 A. Sinovel did arrange for Gemini to perform maintenance
11 work. However, they -- it was ultimately not paid, so we
12 ended up paying Gemini for their maintenance work.

13 Q. Okay. Let's break this into parts. So, first of
14 all, let's just get back to the question I asked. Did
15 Sinovel abandon the maintenance agreement without
16 selecting a new vendor?

17 MR. AGOGLIA: Objection. Asked and answered.

18 THE COURT: Overruled.

19 A. At the time that Sinovel abandoned the Charlestown
20 turbine, there was no vendor -- no replacement selected.

21 Q. And eventually you helped arrange Gemini; is that
22 correct?

23 A. That is correct.

24 Q. And you had to pay Gemini when Sinovel did not pay
25 Gemini; is that correct?

1 A. That's correct.

2 Q. And does the 77,000-plus indicate the amount you paid
3 to Gemini above and beyond an amount you had provided to
4 Sinovel for Sinovel to perform the maintenance agreements?

5 A. That's correct.

6 MR. O'SHEA: Nothing further.

7 THE COURT: All right. Very good. Thank you,
8 Mr. Shah.

9 THE WITNESS: Thank you.

10 (Witness excused at 11 a.m.)

11 THE COURT: All right. Okay. So, Mr. O'Shea,
12 those are your four witnesses; is that correct?

13 MR. O'SHEA: That's it.

14 THE COURT: All right. Let's take a ten-minute
15 break and then we can reconvene and we can then figure out
16 what we're going to do with this and proceed with the rest
17 of the sentencing. So ten minutes, so that's 12 minutes
18 after 11.

19 (Recess at 11:02 a.m. until 11:12 a.m.)

20 THE COURT: All right. Mr. O'Shea, what's next?

21 MR. O'SHEA: Well, what is left to do is to talk
22 about the other guidelines disputes. Loss obviously would
23 be the biggy. And we'll just generally argue about the
24 sentence to be imposed. We'll talk about the probation
25 conditions and the amount of the fine. The timing of the

1 fine is still at issue. And then at some point the Court
2 will advise of appellate rights and we'll talk about
3 whether they should escrow the fine and the Court can --

4 THE COURT: All right. So as I see it, the loss
5 amount under the guidelines is really the issue. And
6 again I continue to believe that the guideline calculation
7 really is an academic exercise here at this point. But
8 the Court of Appeals likes it when I do the guideline
9 calculations, so I'm going to do it.

10 So with the loss amounts, one of the central
11 conundrums presented in this case is the difference
12 between the losses that are properly recognized as losses
13 under the guidelines, direct losses that are recoverable
14 as restitution, and then a set of consequential losses
15 that are neither. In a lot of cases, that distinction
16 between the consequential losses and the recoverable
17 losses kind of fall into nice neat bundles and it's not
18 that complicated.

19 But here, given the circumstances of this case in
20 that we have this theft of the trade secrets and the
21 copyright infringement as well as the wire fraud happens
22 to be so intimately related with the business relationship
23 between the two parties here that drawing that line
24 between the consequential losses and all the others is
25 complicated, to say the least.

1 But start me out with this at least: Tell me what
2 the -- help me understand the difference between the
3 losses that I can recognize under the loss calculation
4 under the guidelines and the restitution amounts. So I
5 think I have a generally good idea about the basic
6 principles involved in the direct versus consequential
7 losses for restitution purposes, but the loss amount
8 calculation under the guidelines is somewhat broader than
9 the amounts recoverable as restitution.

10 So what else can I throw into the loss amount that I
11 can't in restitution?

12 MR. O'SHEA: Okay. The big thing is something --
13 well, we don't have to -- well, the big thing we don't
14 have to worry about is that oftentimes the big difference
15 between 2B1.1 loss in restitution is intended loss. We
16 don't have to worry about intended loss in the context of
17 restitution, not so much of a factor here because all the
18 losses, the United States respectfully submits, are actual
19 losses. Okay. So that's it.

20 The other thing is I'm not asking the Court to make a
21 restitution finding at all. The Court -- I'm asking the
22 Court to require, for purposes of probation, Sinovel to
23 pay the next \$25 million to American Superconductor and to
24 pay the \$850,000 -- it looks like it's on the way -- to
25 Massachusetts turbine owners.

1 THE COURT: Yeah.

2 MR. O'SHEA: If Sinovel doesn't pay the next
3 installment of \$25 million, then we'll argue about how
4 that all breaks down based on the facts that have been
5 developed.

6 THE COURT: Okay.

7 MR. O'SHEA: So really I think we're just talking
8 about losses here, actual losses, and there are different
9 ways to think about the actual losses. And they mostly
10 break down, as we've explored here, the market is, I
11 respectfully submit, the simplest way to do it, because if
12 the market is ultimately informed a year later, at that
13 point the market knows that not only has Sinovel broken up
14 with American Superconductor, but they've stolen their
15 trade secrets. So I think that the one-year is the
16 simplest, easiest way to encapsulate all of the losses and
17 that's perfectly appropriate under the guidelines. So I
18 suggest that the market loss --

19 THE COURT: Help me understand why -- it seemed
20 to me that the guidelines suggested, in a trade secret
21 case, what I really should look at is the diminishment of
22 the value of the trade secret. This is not just a trade
23 secret case.

24 MR. O'SHEA: Right.

25 THE COURT: I recognize that and it has some

1 important consequences for us.

2 MR. O'SHEA: Right.

3 THE COURT: But looking at it just from the
4 prospective of a trade secret case, the question before me
5 is what was the trade secret that was misappropriated
6 worth.

7 MR. O'SHEA: Yeah.

8 THE COURT: One way to look at it is the way
9 Mr. Agoglia advocates and that is it's the development
10 cost. And nobody seems to be really enthusiastic about
11 this. Mr. Agoglia hasn't put in evidence of it. You
12 haven't put in evidence of it.

13 I think you are convinced that the development cost
14 is a vastly inadequate way of measuring the value of it.
15 And you gave me the Coca-Cola example, which, while not
16 necessarily on all fours, is pretty persuasive to me. I
17 don't think this is a place where we would just look at
18 the development cost of the trade secret. But although
19 Mr. Agoglia really emphasizes that development cost as
20 "the" way to calculate the value, it's not the only way.

21 There's also the question about the diminishment of
22 the value of the trade secret as a result of the offense.
23 And so I think that's the argument that you're trying to
24 make to me, which is that we have to look at some kind of
25 a proxy for the value of that trade secret.

1 And so, so far, am I right; is that really what we're
2 looking for is the value of the trade secret?

3 MR. O'SHEA: Yeah. Correct.

4 THE COURT: Because I certainly agree with you
5 that the sequence of actions here had catastrophic effects
6 on AMSC and Massachusetts wind turbine operators. But in
7 calculating the loss amount, do I get to look at all that
8 or do I just -- am I just really trying to find a proxy
9 for the value of the trade secret?

10 MR. O'SHEA: I suggest that the market value is a
11 fair proxy of the value of the trade secret, because what
12 changed? You know, AMSC, for a while, they have all the
13 same people, they have all the same equipment, they have
14 all the same computers and forklifts and everything is the
15 same. What changed? The trade secret is stolen. And
16 then the market, when they're fully informed, "Hey, the
17 trade secret is stolen," that's what's there. So I think
18 that is a totally fair representation of the value of the
19 trade secret. That's number one. Mr. Agoglia likes
20 development costs and I've got the Coca-Cola example in
21 there.

22 The other part is the Court -- as we learned at
23 trial, the PLC and the PM3000, the physical products and
24 the software, developed incrementally over many years.
25 And the changes in the LVRT are so interwoven with

1 existing software and the many many generations, it
2 changes. It would be an exercise, an expensive and futile
3 exercise, to try to subtract all of that out. So that's
4 why we didn't fiddle around with development costs.

5 THE COURT: Okay. So the difficulty that I have
6 with the events, I'm not saying I'm not -- it certainly
7 has the virtue of simplicity to just look at the stock
8 price. But the concern that I have is that the stock
9 price fell not just because the trade secret was stolen,
10 it fell because Sinovel then canceled its contracts.

11 And so Mr. Agoglia then has an argument, with some
12 force, that really that's kind of a consequential damage
13 from the theft itself. It's not directly from the theft.
14 I don't really care whether Mr. Agoglia is going to try to
15 persuade me that it was just a legitimate business dispute
16 and that the turbines -- the equipment was nonconforming
17 because it didn't pass the LVRT standards.

18 I'm persuaded that the theft of the trade secret
19 occasioned Sinovel to abandon its contracts and to
20 repudiate its contracts with AMSC because now having the
21 availability of the software, they were able to supply the
22 power conversion equipment with cheaper components.

23 MR. O'SHEA: Right.

24 THE COURT: I'm persuaded by that. I think that
25 was amply established really at trial, although there's

1 really no jury finding on it. But when I look at it, I
2 think the evidence establishes to a preponderance that the
3 reason Sinovel canceled its contracts was that they had
4 acquired the software needed to run the components, so I'm
5 persuaded of that.

6 MR. O'SHEA: Okay.

7 THE COURT: But it does seem to me there's an
8 intermediate step in there. It isn't just the pure theft
9 of the trade secret; it's that and then the canceling of
10 the contracts.

11 MR. O'SHEA: And it was a conspiracy and there's
12 a scheme with multiple objects. And we see here
13 Karabasevic talking about his conversation with Mr. Zhao.
14 He says, "Hey" -- and this is in April, a month after his
15 theft -- "Hey, we talked about it. They're breaking up."
16 This was part of the scheme. This was part of the wire
17 fraud scheme.

18 THE COURT: And for Mr. Karabasevic.

19 MR. O'SHEA: Yeah.

20 THE COURT: And factor this in for me: He
21 intended to inflict harm on AMSC. That was part of his
22 object. I don't know -- you can help me out if I'm
23 misunderstanding that -- I don't know, is it fair to call
24 that an object of the conspiracy when one of the
25 conspirators had this as the object?

1 MR. O'SHEA: And as we developed at trial,
2 Karabasevic is an agent of Karabasevic.

3 THE COURT: Yes.

4 MR. O'SHEA: There's no Mr. Karabasevic hiding
5 behind the curtain -- or Mr. Sinovel hiding behind the
6 curtain.

7 THE COURT: I agree with that, but here's my
8 question --

9 MR. O'SHEA: Yeah.

10 THE COURT: -- I'm not sure that it was Su and
11 Zhao, the other main conspirators, that they cared
12 particularly to inflict the harm on AMSC.

13 MR. O'SHEA: They certainly -- as a whole, the
14 communications certainly made clear that they intend to
15 take something from --

16 THE COURT: True.

17 MR. O'SHEA: -- AMSC.

18 THE COURT: That's very true.

19 MR. O'SHEA: They knew better. I mean, it's a
20 zero. If they have the benefit, then AMSC loses. That is
21 just -- there are -- in terms of the stock, when we talk
22 about that being a rough approximation, we see
23 communications where Karabasevic reflects that other
24 engineers at Sinovel were following the stock price drop
25 of American Superconductor. I don't think he was the only

1 one taking delight in it.

2 In another communication later he talks about,
3 Mr. Karabasevic -- I'll find it real quick. I'm sorry.
4 It's the one where he says it goes to billions in the end,
5 but he says that they're not going to pay American
6 Superconductor the 150 million they owe them and at the
7 end of the day it goes to billions in the end. I mean,
8 this is -- he's an agent. He's talking often and relating
9 conversations with Su and Zhao. That's what the whole
10 scheme was about.

11 THE COURT: There's a fine distinction. I agree
12 that the whole scheme was to acquire the software that
13 AMSC had developed.

14 MR. O'SHEA: Yeah.

15 THE COURT: And I think it was Karabasevic's
16 personal goal to inflict harm on AMSC.

17 MR. O'SHEA: Right.

18 THE COURT: But I'm not sure that the stock price
19 decline was an object of the conspiracy.

20 MR. O'SHEA: Yeah. Well, the bank robber doesn't
21 intend to sideswipe a pedestrian. But if that's what
22 happens, that's what happens. So we just take the facts
23 as they are. It is a result, direct result, of Sinovel's
24 crimes and their schemes.

25 THE COURT: Okay. All right. Mr. Agoglia, you

1 want to be heard on that, I assume.

2 MR. AGOGLIA: I do, Your Honor. Thank you. We
3 do submit that if we are going to be following the
4 guidelines, we do need to look at what they say and the
5 Seventh Circuit says is the primary basis to value loss
6 for purposes of 2B1 calculations. It is development
7 costs.

8 THE COURT: I'm going to cut you off. I don't
9 need to hear any more about that. The guidelines say
10 development cost or the diminishment of the value. In the
11 *Pu* case, they say when there's nothing else, when there's
12 no gain to the defendant, you can look at development
13 costs. But that is an unreasonably circumscribed view of
14 the valuation in this case. And so I think we're
15 really -- in the prong here where we're looking at the
16 diminishment of the value, that's where we are.

17 MR. AGOGLIA: I start with *Pu*, Your Honor, but we
18 do address and intend to address how else you might
19 approach the valuation question, because we have concerns
20 about methodology here and these are issues that are the
21 sort of *de novo* review issues that we are concerned about.

22 The other common, accepted method for valuing, we
23 provided the circuit authority cites for it, is to look at
24 sales diverted from AMSC to Sinovel in terms of third
25 parties. Let me address that.

1 THE COURT: Okay.

2 MR. AGOGLIA: The evidence at trial, we submit,
3 was overwhelming that the software here was used only in
4 AMSC machines. We think the evidence at trial was
5 overwhelming from the AMSC engineers, from both Austria
6 and from here, that that is what you would expect because
7 it was bespoke. It was written specifically for that
8 hardware and that you would have to reengineer it to make
9 it work with the so-called *cheaper components*.

10 There's not a piece of evidence in this record that
11 Sinovel sold any component with that software to somebody
12 else or used it in another turbine. They used it with
13 AMSC products. That's what was taught by the evidence
14 from Massachusetts. And they modified it to make it work
15 as they believed it was required to work from the start.
16 The LVRT stuff is what was modified there.

17 So we think that's the evidence and that means
18 something for valuations. It means if we're not in a case
19 where you would look at the total --

20 THE COURT: Remind me, was it AMSC power
21 conversion equipment in the Massachusetts wind turbines?

22 MR. AGOGLIA: Yes, Your Honor.

23 THE COURT: Okay.

24 MR. AGOGLIA: Both their PLCs and their power
25 converters.

1 THE COURT: Yeah.

2 MR. AGOGLIA: And it was the binary files which
3 the FBI agents trace back to the original source code.
4 That was the again proof of use, but use with AMSC
5 components. And again we would submit that's the only
6 natural consequence of what the engineers testified to.
7 And this is separate and apart from the side issue of the
8 encrypted communications portal. That really was designed
9 to safeguard AMSC from having a different converter work
10 with their programmable logic controller.

11 But the IP that controlled both of those was
12 specifically designed for those pieces of hardware and
13 would not work unless you reengineered it. And we heard
14 various testimony about the difficulty of doing that and
15 whether it would be cheaper to start from scratch.

16 So we're not in that circumstance where you would
17 have a normal IP valuation scenario where we're looking at
18 product sales from Adobe that were diverted to the
19 defendant's customers.

20 THE COURT: I understand.

21 MR. AGOGLIA: So that would be the second and
22 most logical basis to look at it.

23 The other ways in which, if you look at civil
24 misappropriation standards as an alternative accepted
25 methodology, they ask, if you want damages, you must show

1 either that the theft deprived the company, AMSC in this
2 instance, from the opportunity to continue using it, which
3 didn't occur here -- it was a copy; they had it; they
4 still had the ability to use it freely with other
5 customers -- or, independently, that the defendant
6 publicly disclosed it and therefore eliminated the secret
7 and value from the secret.

8 THE COURT: That's not the case here either.

9 MR. AGOGLIA: So those are -- and that's why we
10 submit to you that the development cost is a metric used
11 in these cases. In that scenario, it wouldn't be nothing.
12 It would be, "Okay. So what did it cost you to do that?"

13 And the evidence at trial, we think and submit, is
14 that they have in this development where -- in
15 Mr. Buerosee's chart, his chart of stages -- everything up
16 to the source code writing had been purchased in advance.
17 But whatever the development cost they would want to
18 submit are, they haven't done that. We have nothing.

19 THE COURT: I agree with you there.

20 MR. AGOGLIA: But I raise that because those are
21 the only three accepted metrics.

22 THE COURT: Yeah, but you're overlooking
23 something here and that is that you say that there's no
24 evidence that anyone used the AMSC software with any
25 components other than AMSC components. We don't know what

1 Sinovel did with the software once it misappropriated it.
2 We don't know what's going on in China with Sinovel and
3 its operations or anywhere else in the world.

4 The point of it, and there was evidence in the case
5 that said this, was that the objective was to get the
6 software. And once the software was acquired, then it
7 could be used with other cheaper components and Sinovel
8 would not have to buy from AMSC anymore.

9 The software was kind of the reason Sinovel was
10 committed to buying AMSC equipment, because it had
11 software that worked. They could misappropriate the
12 software, then they would be free to use other components
13 with it. That was their intent.

14 We don't know what they did in China with it. They
15 fled the United States and so we don't have any use in the
16 United States with other equipment. But we don't know
17 what happened in China. And there was evidence in the
18 case that that was their objective of the conspiracy.

19 MR. AGOGLIA: I would just note, Your Honor, that
20 that evidence was, at best, thin, that the engineering
21 testimony was very clear that that you could not do.

22 THE COURT: This needed to be edited or revised
23 to work with other components partly because of the
24 protections that were built into the AMSC software and
25 that the acquisition of the source code was what made that

1 editing possible.

2 I grant you, this is not the prototypical case where
3 we have a software company stealing software from somebody
4 else and then selling it to somebody else. We have both
5 parties are bundlers, I guess I would say.

6 So AMSC has software which it maintained as a trade
7 secret and then incorporated into its equipment so its
8 equipment would work. That software was a very important
9 part of the functionality of that equipment. And they
10 took fairly extraordinary steps to make sure that a person
11 who bought a piece of the power equipment couldn't reverse
12 engineer and take the software out of it.

13 Then Sinovel is in the same situation. They didn't
14 want to sell LVRT software or power control software.
15 They just wanted to have working software that worked so
16 that they could get their equipment for as cheap as they
17 could get it. They didn't want to have to pay the AMSC
18 premium price for the equipment; they wanted to do it on
19 their own.

20 So there's nobody selling it or disclosing it
21 anywhere else, so it's an atypical case. But the sales
22 that are diverted from AMSC are Sinovel's own use.

23 MR. AGOGLIA: That would be Sinovel's use in
24 AMSC's products though, Your Honor.

25 THE COURT: That's what you say. But what I'm

1 saying is that the testimony at trial, and we really don't
2 know what happened in China after the theft, but the
3 testimony was -- I don't think it was thin at all. It was
4 very clear that this was what the object of the conspiracy
5 was: to get this software.

6 And Karabasevic certainly wasn't concerned with
7 making sure that Sinovel had a compliant product. He said
8 he was out to get -- he's resentful and angry and he
9 relished the decline in the stock price. It's not thin
10 at all.

11 MR. AGOGLIA: I think it's thin on any of the
12 documents that said, from Sinovel's perspective, "We now
13 are going to deploy this in other goods and products," and
14 there's just a complete failure of proof that that didn't
15 happen.

16 That matters in this context: I would say that the
17 evidence was overwhelming that the changes that were
18 made -- and bear in mind, for the second of the two
19 components, the PLC, it was only binary files -- the
20 PM3000. I'm sorry. I've got it backwards -- which
21 everyone said, all the experts agreed, you couldn't
22 reverse engineer to do that in the first place. So for
23 the programmable logic controller, that was a theoretical
24 possibility.

25 But I do think the undisputed testimony at trial is

1 that would be a herculean undertaking to reengineer that
2 stuff because of the way in which, from scratch, it's
3 written for particular hardware. And I think there was
4 one witness who said it would be as quick probably to
5 start from scratch with your own source code, so there
6 were challenges.

7 And why is that relevant? Because I think the
8 evidence of how they used it was to make what at that
9 point was, the horns of the dilemma was, we've got
10 thousands of units in the field that need to work with the
11 LVRT grid code requirements. And I think the evidence was
12 undisputed that that would need to be addressed with those
13 existing units.

14 So there was an enormous incentive, I grant you, to
15 have that software and have it work and we would say great
16 frustration in the inability to make that work through the
17 ordinary commercial channels. But I don't think there's a
18 piece of evidence that it was ever actually used in a
19 component that wasn't an AMSC component, which means they
20 are still tied, inextricably tied, to each other.

21 And I think the sales data, in terms of post offense,
22 doesn't support -- I understand the Court's questioning
23 about what happened in China. But on a bottom-line level,
24 we do have the information that there was a nosedive in
25 new sales and that there was existing income because they

1 were already up on wind farms and in grids, but that's
2 what the financial information shows. So I don't think it
3 even supports an inference --

4 THE COURT: You're talking about the downturn in
5 the wind market?

6 MR. AGOGLIA: Downturn in the wind market and
7 downturn that was specific to Sinovel, that Sinovel not
8 just lost absolutely, but it lost market share relative to
9 everyone else in the China wind market, which was a
10 function of them not expanding their footprint or
11 declining more rapidly.

12 But let me just speak briefly to this notion of a
13 stock market valuation. Again I don't think there's a
14 factual and causal issue, which the Court is aware of
15 we've advanced, that you look at that stock drop and it is
16 triggered by the announcement of the rejection of goods.

17 So you have to make a determination that but for the
18 theft of the software, Sinovel would not have rejected the
19 goods. And we think there are factual reasons why you
20 can't do that, including temporally that that March
21 shipment was already overdue for months before that
22 happened.

23 And I would say that what has not been ever adduced
24 in this record, despite thousands of reams of
25 communications, is anyone -- D.K. -- Karabasevic, excuse

1 me -- Su, Zhao -- saying, "Now we got it. Now we can" --
2 I mean, Karabasevic is a disgruntled employee and he
3 certainly said things like, "Now you can be free of AMSC,"
4 but said that in the context where they were modifying it
5 to use, in that moment, using AMSC components.

6 So I don't think you can attribute the stock market
7 drop even to the theft of the trade secret without making
8 a lot more specific finding. It's also a very very
9 inexact, we would say impermissibly inexact, proxy for the
10 trade secret value itself that if you're looking at
11 causation, you would fairly, even in the worst-case
12 scenario, attribute some of that drop to a deterioration
13 in the commercial relationship which, as a matter of
14 record, was something that existed and endured between the
15 two parties. That had to be repaired for those shipments
16 to come back online.

17 So it's not -- I've never seen any authority which
18 recognizes that stock market drop as a proxy for the value
19 of the trade secret at issue, particularly here where the
20 trigger of the drop for public disclosure was not any
21 information about the theft of trade secret. The market
22 responded to a rejection of orders. So I think that's
23 problematic.

24 And then as to the D.K. statement, he is absolutely a
25 disgruntled former employee and after the fact says -- you

1 know, I dare say revels in the fact -- that there's
2 misfortune at his former employer. That isn't a basis to
3 either impute that to the entirety of Sinovel as having
4 intended from the outset to harm AMSC. And I think under
5 *Pu*, what you can't do is impute an amount by which they
6 intended to harm from those facts. And I think that's the
7 teaching from the Seventh Circuit.

8 THE COURT: I'm not clear how *Pu* gets us there,
9 but --

10 MR. AGOGLIA: Well, in *Pu*, as I understand it,
11 the intent-to-injure component was what they were
12 calculating loss under, not actual loss, because there
13 hadn't been actual loss.

14 THE COURT: Yes.

15 MR. AGOGLIA: And then the district court had
16 used development cost information, approximately
17 \$12 million, from the affected companies to say, "Aha,
18 that is the number we're going to arrive at as your
19 intended cost."

20 And the Seventh Circuit said, "No. You don't have a
21 nexus between those two. You have to show more than an
22 intent. You have to show -- you have to prove the amount
23 by which they intended to harm separately."

24 THE COURT: It is such an apples-to-oranges
25 comparison. I don't see that *Pu* has that much really to

1 teach us because the problem in *Pu* was that the guy didn't
2 intend to -- he simply intended to use the software for
3 his own benefit. He didn't intend to deprive his former
4 employers of the software that he took.

5 MR. AGOGLIA: I think Mr. O'Shea said we're not
6 here addressing under the guidelines sort of an intent to
7 harm. All I'm saying is I think what *Pu* would say is, if
8 you were to go there, you would have to have a basis to
9 find the amount by which the defendant intended to harm,
10 not just the fact of intent.

11 THE COURT: I think Mr. O'Shea said we're not
12 doing intended harm.

13 MR. AGOGLIA: Okay.

14 THE COURT: We're doing the actual harm. All
15 right. I'm prepared to make a ruling on this. It's a
16 complicated and not a prototypical "theft of trade secret"
17 case. But I'm convinced that the offense resulted in a
18 loss that exceeds \$550,000. And so as to that element, I
19 think the 30-level enhancement is appropriate.

20 I do think that the evidence persuades me, certainly
21 to a preponderance of the evidence, that there is a chain
22 of cause and effect and that the theft of the trade secret
23 and the criminal copyright infringement too, which is a
24 different thing -- you know, you don't have to, you know,
25 penetrate any secrecy of just using copyrighted goods

1 without authorization with an intended financial gain --
2 that Sinovel intended to misappropriate this software,
3 thereby achieve the ability to be independent of AMSC.

4 And it was as a result, and judged primarily by the
5 sequence of events and the lack of other explanations,
6 that once the trade secret was misappropriated, it was
7 then free to repudiate those contracts. And so the
8 repudiation of the contracts then was the precise and
9 immediate cause of the precipitous drop in stock price.

10 Either way, whether we judge it by the decline in
11 stock price or the immediate loss in business, and I'm
12 cautious here that we are not judging the loss by the loss
13 of the expectation of the performance of the contracts,
14 but it was the loss of the software's secrecy, the fact
15 that Sinovel had engaged Karabasevic to steal it, gave
16 them the freedom to repudiate those existing contracts.

17 And so that without that component of their product,
18 the software protected by intellectual property through
19 copyright as well as trade secret protection, that that
20 led very directly to the repudiation of those contracts
21 and that that is what caused the stock price and the loss
22 of business, either one of which would get us to a loss
23 that exceeds \$550,000.

24 MR. O'SHEA: Your Honor, you said 550,000.

25 THE COURT: I'm sorry, 550 million.

1 MR. O'SHEA: Thank you.

2 THE COURT: 550 million. There's a lot of zeros
3 here. It's easy to get confused.

4 MR. O'SHEA: Yeah.

5 THE COURT: 550 million. So I think that is the
6 objections on the guidelines. Are there any other
7 objections on the guidelines?

8 MR. AGOGLIA: Our addendum and written
9 submissions, you know, speak for themselves there, but we
10 understand your finding.

11 THE COURT: Yeah. And again I'll just note
12 again, I said it repeatedly, this really is an academic
13 part of our sentencing here.

14 So base offense level is 7. We have the loss amount
15 gives us an additional 30 levels. We've got the
16 substantial part of the offense committed outside the
17 United States. That gives us a two-level enhancement
18 under 2B1.1(b)(9)(B).

19 Then we have the special offense characteristic that
20 AMSC was a publicly-traded company that had more than a
21 thousand employees at the time of the offense. Therefore,
22 there would be a four-level increase that is warranted
23 under guideline section 2B1.1(b)(14)(B)(ii)(I or II).

24 I'll note here too, by the way, that we're using the
25 2010 guidelines. So if you want to trace, for those of

1 you scoring at home, don't forget to use the 2010
2 guidelines, because that particular offense characteristic
3 is different than the newer guidelines as well.

4 So that gives us a total offense level of 43, which
5 would be relevant to my adjustment of the fine amount,
6 which I'm not able to do here because there was not a
7 finding about the loss amount found by the jury.

8 So I'm going to ask Mr. O'Shea to correct me if I'm
9 wrong here, but my understanding is that I'm stuck then
10 just with the statutory limit of the fine and this
11 guideline calculation would be relevant to a fine
12 multiplier which doesn't apply here.

13 MR. O'SHEA: That's true.

14 THE COURT: So for all that work, and I know
15 there are other reasons regarding the expression of
16 outrage at criminal activity, and so on, that we want to
17 fix the loss amount and recognize the consequences of the
18 crime on the victims here, but for guideline purposes, it
19 doesn't really affect the sentence.

20 So now the question is what fine should I impose.
21 And I believe that we have agreement on restitution and
22 that the government is not asking me to find a restitution
23 amount, which I'm glad to hear because I'm glad I've got
24 the evidence, but there are some pretty difficult
25 questions here to really nail down the restitution amount.

1 Under the circumstances here, if I've got an agreement
2 between the defendant and the victims as to what a
3 compromised amount of restitution is, I'm going to respect
4 that.

5 And this is one of those cases where I can avoid a
6 lot of very difficult decision making and calculations.
7 I've got the evidence presented. Frankly, I might want
8 more if I actually were to fix the restitution amount, for
9 various reasons which I'll highlight here. I'm confident
10 that the restitution amount would probably be more than
11 the compromised amount, that's what compromises are, but I
12 have my misgivings about the approaches of value.

13 I'll note this one here: The one that would be most
14 tailored to figuring out the diminished value of the
15 intellectual property at issue here, which is the
16 copyright and trade secret reflected in the source code,
17 that would be some sort of evaluation of the IP revenue.
18 I would love to have that. But I'm afraid that the 25%
19 attribution was just kind of pulled from thin air.

20 And so in a case in which you are valuing
21 intellectual property, you would look for comparable
22 sales. It's not that different from real estate, frankly.
23 You'd look for some comparable sales and you'd find out
24 what software like this is worth. You'd find out whether
25 there were any licenses that were done for this. You

1 might compare the market value for power conversion
2 equipment by other manufacturers that didn't have the AMSC
3 software. There would be all sorts of ways of actually
4 trying to solve for the variable of the value of the
5 intellectual property that was misappropriated.

6 And I just think I have such -- it probably
7 overstates its accuracy to call it *rough and ready*. And
8 so I just -- that is the one that I think would be the
9 best way to really approach the value, the diminished
10 value, of the intellectual property as a result of the
11 theft.

12 I've got respect for how complicated the project is,
13 but there are people who do this kind of work. And
14 basically a search for appropriate comparators with
15 adjustments for the differences between the comparators
16 and the product here would have been I think a good way to
17 go with it.

18 There's nothing wrong with the way that AMSC priced
19 and packaged its products, perfectly appropriate, but it
20 does make it a little bit harder to solve for the variable
21 that is most important for me here.

22 With the market loss, I do have my concerns, as I've
23 indicated, that there is a sequence of causes there. The
24 consequences of the crime were very substantial. I don't
25 know that the market loss really gets us to that very

1 direct diminishment of value of the intellectual property,
2 which I think is what the law tells me I really should be
3 looking at here.

4 I know there are other aspects of the crime: It is a
5 conspiracy. But the overall object of the conspiracy, it
6 seems to me, was to expropriate the software and the
7 intellectual property that it reflected, and that was the
8 object of the conspiracy. That was also the object of the
9 wire fraud crime as well.

10 I don't have any trouble seeing that the
11 Massachusetts turbine owners are victims here. It's kind
12 of a coarse metaphor here to call them a "pedestrian
13 sideswiped by a bank robbery." But I do think that the
14 flight from the United States, after the charges were
15 brought, was part of a common scheme or conspiracy, that
16 it was a flight to avoid prosecution as a result of the
17 charges being brought.

18 So as a result of that, Sinovel withdrew from the
19 United States and left the Massachusetts turbines damaged.
20 You know, it wasn't literally side-sweeping, but it's not
21 that far off. And so the owners of the turbines had to
22 fend for themselves in order to keep their turbines
23 running, so I have no trouble finding them to be victims
24 of the offense.

25 And again, as far as the amount goes, it's

1 complicated, but we have an agreement. So if I'm called
2 do it, because of the failure of Sinovel to make good on
3 its promises in the settlement agreement, we'll sharpen
4 our pencils and do more work on it. But I don't think
5 that I have to -- I'm called upon to make that
6 determination today in light of the settlement.

7 The lost gross margin revenue approach I think
8 suffers from the vulnerability that Mr. Agoglia points out
9 that it is really much more heavily oriented toward a
10 recovery of expectation damages which I don't think are
11 appropriate to recover on as restitution.

12 So those are my misgivings about the valuation
13 approaches here. I'll do the work if I'm called upon to
14 do it, but I don't think at this point I'm really called upon
15 to do it. And I think Mr. Agoglia has indicated that the
16 loss amount is at least enough to support the \$500,000
17 per-count fine, so I think the fine would be \$1.5 million.

18 I will provide as a condition of probation that
19 Sinovel make good on its promises under the settlement
20 agreement. I don't know if there are any other conditions
21 that are warranted or appropriate here. I thought about
22 whether we should have conditions imposed should Sinovel
23 decide to do business in the United States, but that might
24 seem like a daunting task to craft those conditions and I
25 don't know if they're really worth it.

1 What I had in mind was something like if Sinovel were
2 to return to business in the United States, they would
3 have to demonstrate to the probation office that they had
4 an intellectual policy and program in place to prevent
5 theft of intellectual property as a condition of their
6 returning to business in the United States. But that
7 seems like a remote contingency and even that condition
8 might be very hard to craft in a way that's really
9 meaningful.

10 So, Mr. O'Shea, are there other conditions that would
11 be appropriate?

12 MR. O'SHEA: No. And I thought about, as the
13 Court has, whether there were other conditions that we
14 could impose should they return to the United States --
15 that seems remote -- and absent a return to the United
16 States. Even if they returned to the United States, it
17 would be difficult to genuinely enforce those conditions
18 in terms of what policies were really being followed in
19 China at all.

20 THE COURT: Yeah. And I think to add one more
21 point to that, I think they had policies in place now or
22 at the time of the offense. But having a policy and
23 actually respecting the intellectual property rights of
24 your business partners are two different matters.

25 MR. O'SHEA: Well, it's the president's and CEO's

1 seal on Karabasevic's contracts, so I would suggest they
2 weren't enthusiastically followed at the time.

3 THE COURT: That's certainly true.

4 MR. O'SHEA: So I would suggest that the two
5 probation conditions be to pay the \$850,000 to the
6 Massachusetts turbine owners. I believe that's set up to
7 go into the Fairhaven account and that they will divvy it
8 up, that we'll trust those folks to divvy it up from
9 there. And then I understand Sinovel is going to pay
10 American Superconductor an additional \$25 million in ten
11 months from now. That's my understanding and that's what
12 I suggest should be the conditions.

13 THE COURT: Under those circumstances, since the
14 last payment is due in ten months, it seems appropriate to
15 make the term of supervision a year then.

16 MR. O'SHEA: Yes. I agree. I did not understand
17 that Sinovel was agreeing that the \$1.5 million was the
18 appropriate fine. I also understand that they suggest the
19 payments should be spread out. I have some arguments in
20 support of the \$1.5 million fine, but if that's no
21 longer --

22 THE COURT: Well, let's find out. Maybe I'm
23 reading too much into the sentencing memorandum that I
24 have got here. So, Mr. Agoglia.

25 MR. AGOGLIA: Sinovel's position on the fine,

1 Your Honor, is that, number one, it concedes that the
2 amount of agreed-upon restitution is in and of itself
3 sufficient to authorize the Court to issue a fine up to
4 the requested maximum of 1.5. So there isn't a sentencing
5 guideline issue, which is why we said it was academic.

6 THE COURT: Yeah.

7 MR. AGOGLIA: Whatever that max is that is
8 authorized, you would still appropriately consider things
9 like the payment of the fine on the payment of
10 restitution. We think the presentation on Sinovel's
11 finances was pretty straightforward at the end of the day.
12 They paid \$32.5 million. Total cash reserves were 38.

13 So we simply say we commit to your discretion whether
14 or not that should be adjusted downward at all from 1.5
15 and staggered in some way in light of the interest in
16 making sure it does not have the effect of interfering
17 with the promised payments of restitution. This is not
18 something that we intend to address further than
19 committing it to Your Honor's discretion.

20 THE COURT: All right. I will impose the \$1.5
21 million fine. I know that Sinovel's prospects have
22 diminished since the offense was committed as well.
23 Nevertheless, I think that in light of the financial
24 statements that I have received, which do not paint a rosy
25 picture, but nevertheless suggest that there are resources

1 available that would allow them to pay a \$1.5 million
2 fine, that in the complex of this case, it's a relatively
3 modest amount and one that I don't think is significant
4 enough to interfere with Sinovel's ability to make the
5 restitution payments.

6 And in this case, as in any other, I would, as the
7 law tells me to and as well as just a matter of simple
8 justice, provide that the payment of restitution should
9 take priority over the payment of any fines. The victims
10 should get paid before the government gets paid.

11 But I will impose the maximum fine because I think
12 that this is a -- it's obviously a very serious,
13 calculating offense. The consequences were really
14 devastating and I want to send the message to the
15 defendant that the Court strongly disapproves of this;
16 that the restitution, appropriately limited to direct
17 loss, does not capture the full impact on the victims here
18 and it also doesn't fully appreciate the impact that it
19 has on business relations between the nations; but also,
20 just in general, that failing to respect intellectual
21 property rights is a serious crime that inhibits the fair
22 exploitation and development of technology.

23 So in view of the seriousness of the crime and to
24 promote respect for the law, I am going to impose the
25 maximum fine of \$1.5 million. As I said, it doesn't

1 interfere with the payment of restitution.

2 As far as the payment of the fine, it seems --

3 MR. O'SHEA: If I could be heard on the timing.

4 THE COURT: Yes.

5 MR. O'SHEA: I would respectfully request that it
6 be immediate. Sinovel, even under their numbers, they
7 have the cash reserves to pay the fine and restitution.
8 This is punishment. It is supposed to hurt. And given
9 the scale of the harm, even what the Court found,
10 550 million, I think it is fair that the payment be
11 immediate. That's the first part.

12 Secondly, if Sinovel chooses to appeal, I would
13 request that they escrow the entire amount of that fine
14 pending appeal, as the Court is permitted to do.

15 THE COURT: All right. Mr. Agoglia, is this
16 something you want to be heard on or will you commit this
17 to the discretion of the Court as well?

18 MR. AGOGLIA: I think, whether I agree to it or
19 not, that's what Article III confers on you.

20 THE COURT: Yes.

21 MR. AGOGLIA: I would note that 18 USC 3572
22 provides a minimum period of 30 days and that it is
23 completely premature to address questions about what
24 should be done on appeal.

25 There may be questions that are served up to you,

1 there may not be. There may be questions in terms of a
2 stay and the conditions of a stay served up to the Seventh
3 Circuit. So it's a very fluid set of circumstances. We
4 would want to be heard specifically about any formal
5 request to escrow.

6 THE COURT: Yeah.

7 MR. AGOGLIA: It's not the time to do that.

8 THE COURT: All right. I will provide that the
9 payment of the fine should be made within 30 days. I'll
10 tip my hand that I would be respective to a motion to
11 escrow the fine pending appeal. I won't make the decision
12 now because there's no appeal and nobody has asked me to
13 do it, but the briefing can be succinct on the subject.
14 So that will be my order on the fine: payment within 30
15 days.

16 And then I think I will ask Mr. Williams to circulate
17 to the parties the exact language that we'll use to
18 establish the two conditions of supervision, which is that
19 Sinovel complete the \$850,000 payment to the Fairhaven
20 account for further distribution. And that payment is in
21 process already, so we won't be paying it to the court for
22 distribution. It's going to be paid directly to the
23 victim. That's also true, I gather, with the payment to
24 AMSC?

25 MR. AGOGLIA: Yes. Your Honor, I would suggest

1 that the Court's order direct that the agreements be
2 fulfilled according to their terms, because there are
3 those specific payment terms.

4 THE COURT: Yes.

5 MR. AGOGLIA: There is, for example, a specific
6 payment term that Mr. Deane negotiated about the eventual
7 resting spot.

8 THE COURT: Yes.

9 MR. AGOGLIA: There are third-party guarantees
10 with respect to the second payment due to AMSC that I
11 don't believe the Court intends to modify/alter/interfere
12 with. And so we would want the Court's order to simply
13 reflect that the parties are, as a condition of probation,
14 directed to do what they are obligated to do.

15 THE COURT: I think that's fair. So I can state
16 them here on the record then. Condition No. 1 is that
17 Sinovel pay the agreed-upon restitution amount to the
18 Massachusetts turbine owners pursuant to the terms of that
19 agreement and that it pay to AMSC the remaining payment --
20 restitution payment pursuant to its agreement with AMSC.
21 That should cover that. All right. And the term of
22 probation will be one year.

23 And just so cards are on the table, if payments don't
24 get made, it is my intent that we would have a
25 resentencing. I believe that I've got the evidence that I

1 would use on that. But if it comes to that, if the
2 parties can be heard about whether I need to hear any
3 additional evidence, then I will do the work of settling
4 the restitution amount then should Sinovel fail to make
5 the payments per its agreements to the victims.

6 All right. Is there anything else we need to address
7 today?

8 MR. O'SHEA: Nothing for the United States.

9 Thank you.

10 MR. AGOGLIA: Nothing for Sinovel, Your Honor.

11 THE COURT: Okay. One last thing though is that
12 Sinovel has the right to appeal its conviction and it's
13 got the right to appeal the sentence that I have imposed.
14 And if it wants to do that, it has to file a notice of
15 appeal within 14 days of entry of judgment or within 14
16 days of any notice of appeal that would be filed by the
17 government.

18 Is there anything else about the right to appeal that
19 we need to address?

20 MR. O'SHEA: Nothing.

21 THE COURT: There you go. You've got your right
22 to appeal. All right. Thank you all.

23 (Adjourned at 12:03 p.m.)

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25

1 I, CHERYL A. SEEMAN, Certified Realtime and Merit
2 Reporter, in and for the State of Wisconsin, certify that
3 the foregoing is a true and accurate record of the
4 proceedings held on the 6th day of July, 2018, before the
5 Honorable James D. Peterson, Chief Judge of the Western
6 District of Wisconsin, in my presence and reduced to
7 writing in accordance with my stenographic notes made at
8 said time and place.

9 Dated this 19th day of December, 2018.

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14
15 _____ /s/

16 Cheryl A. Seeman, RMR, CRR
17 Federal Court Reporter
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